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4.26

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF JUNE 2, TO AND INCLUDING DECISIONS OF DECEMBER 1, 1891,

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,
STATE REPORTER.

VOLUME CXXVIII.

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IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

COMMENCING JUNE 2, 1891.

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WILLIAM B. TREMAINE, Appellant, *v.* WILLIAM Y. MORTIMER et al., Respondents.

The provisions of the act in reference to chattel mortgages (Chap. 279, Laws of 1833, as amended by chap. 418, Laws of 1879), declaring such a mortgage absolutely void as to creditors of the mortgagor unless filed and refiled as prescribed, confers no title to the mortgaged property upon the creditors and they take no interest by virtue of the act; its effect is simply that in the cases mentioned, as between the creditors and the mortgagor, the mortgage has no force and is to be treated as if it had never existed.

The mortgagor as well as the creditors can make this claim, and before the creditors acquire liens upon the property by virtue of executions or other process, the mortgagor may sell or assign and convey an absolute title, or he may deliver the property to the mortgagee in payment of his debt.

A creditor may not, therefore, seize the property under an execution in his favor and at the same time deny that the mortgagor has any title.

After default in payment of a debt secured by a chattel mortgage and even after the mortgagee has taken possession, the mortgagor has a beneficial interest in the mortgaged property which he can convey.

S. executed two chattel mortgages on certain property, which were properly filed, but were not refiled as prescribed by the statute. After the expiration of the time for refiling, default having been made in payment, one of the mortgagees took possession of the property. Thereafter S. executed a general assignment for the benefit of creditors. Upon judgments subsequently recovered against S. executions were issued, under which the mortgaged property was advertised and sold. In an action by the purchaser to recover damages for the alleged conversion, of the property in which the validity of the assignment was in

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no way assailed *held*, that whatever interest S. had became vested in the assignee under the assignment; that plaintiffs acquired no title or interest by their purchase; and, so that the complaint was properly dismissed. *Porter* v. *Parmley* (52 N. Y. 185), distinguished.

(Argued April 30, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 10, 1890, which affirmed a judgment in favor of defendant, entered upon an order vacating a verdict in favor of plaintiff and directed a dismissal of the complaint on the merits.

Upon the trial the court directed a verdict in favor of plaintiff upon consent of the parties, reserving the right to set aside the verdict and to dismiss the complaint upon a motion to be made for that purpose, which was made and granted.

This action was brought to recover damages for the conversion of certain personal property described in the complaint.

The answer put in issue the plaintiff's title and alleged certain facts upon which it is claimed title to the property was vested in the defendant. Upon the trial of the action the following facts appeared: N. P. Sewell, being the owner of the property, executed two chattel mortgages thereon on the 2d of November, 1885, one to the defendants and another to C. L. Chase, and both were filed in the register's office of the city of New York on the same day. The mortgage to Chase was refiled on the 8th day of April, 1887. The other mortgage was never refiled. Chase took possession of the property under his mortgage on the 12th day of December, 1887, default having been made in the conditions thereof, and on the following day Sewell made a general assignment for the benefit of his creditors. Subsequently to the general assignment, five judgments were recovered against him, upon which executions were issued on the 20th, 27th and 30th days of December, 1887, and the 5th day of January, 1888. On the 28th day of December, 1887, in an action of replevin brought by these defendants against Chase, Sewell and Sewell's assignee,

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after default made in the payment of the amount secured by the mortgages of Sewell to the defendants, the sheriff replevied the property, and on January 11, 1888, delivered the same to these defendants. Thereafter Chase assigned his mortgage to the defendants, and the replevin action was discontinued as to him. The defendants retained possession of the property so delivered to them by the sheriff until February 17, 1888, on which day they sold the same at auction, after due notice, and applied the proceeds to the payment of the amount due them upon the two mortgages. The action of replevin resulted in a judgment for the possession of the property, on the 6th day of April, 1888, in favor of the plaintiffs therein, and against the defendants therein excepting Chase. On the 9th day of January, 1888, under and by virtue of the executions above mentioned, the sheriff advertised and sold all the property covered by the two mortgages, to the plaintiff in this action. The plaintiff's complaint was dismissed at the trial term.

Herbert T. Ketcham for appellant. Both mortgages under which the defendants resist the claims of creditors ceased to be valid as against creditors by the failure to refile them within thirty days of the expiration of the year from the original filing. (Laws of 1833, chap. 279, § 8; *Porter* v. *Parmley*, 52 N. Y. 185; *Marsden* v. *Cornell*, 2 Hun, 449; 62 N. Y. 215; *Cooper* v. *Koppes*, 13 West. Rep. 465; Thomas on Mort. 500.) No possession taken by Chase or the defendants could save either mortgage. (*Parshall* v. *Eggart*, 52 Barb. 367; *Keller* v. *Paine*, 107 N. Y. 83; *C. P., etc., Co.* v. *Damon*, 48 Hun, 409.) Expressions may be cited to the effect that "liens without change of possession are good if followed by delivery of possession before the rights of third persons have intervened." This dogma, wherever found, is consistent with the assumption that the possession must be delivered and that creditors are excluded only by a voluntary surrender outside of the requirement of the mortgage. (Jones on Chat. Mort. 178; *Petring* v. *H. D. G. Co.*, 8 West. Rep. 221; *Hauselt* v. *Harrison*, 105 U.

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S. 401; *Q., etc., Co.* v. *Hart*, 48 Hun, 393.) The right of creditors was not destroyed by the debtor's act in making a general assignment. (*Southard* v. *Benner*, 72 N. Y. 424; *Spring* v. *Short*, 90 id. 538; Laws of 1858, chap. 314; *Van Heusen* v. *Radcliff*, 17 N. Y. 580; *N. C. N. Bank* v. *Lord*, 33 Hun, 557; *Steward* v. *Cole*, 43 id. 164; *Dorthy* v. *Servis*, 46 id. 628; *Smith* v. *Paine*, 24 J. & S. 451.) Plaintiff does not depend upon any estate which Sewell had, but on the just though anomalous doctrine, that by his purchase he acquired the right which Sewell's creditors had to disregard the mortgages. (*Hildreth* v. *Sands*, 2 Johns. Ch. 35; 14 Johns. 493; *Porter* v. *Parmley*, 52 N. Y. 185; *Best* v. *Staple*, 61 id. 71.) That Sewell had not possession to turn over to his assignee, distinguishes this case from the decisions in which mortgaged property has been held to be within the administrative care of the assignee. (*Dorthy* v. *Servis*, 13 N. Y. S. R. 1; *Sullivan* v. *Miller*, 106 N. Y. 635.) The levy under which the plaintiff purchased was actual and sufficient. (Code Civ. Pro. § 1405; Crocker on Sheriffs, §§ 432, 464; Murfree on Sheriffs, § 965; *Adams* v. *Bowe*, 12 Abb. [N. C.] 322; *Power* v. *Alias*, 21 J. & S. 480; Drake on Attachments [6th ed.], § 263; Code Civ. Pro. §§ 697, 1406.) The goods being subject to the execution of December 20, 1887, there can be no doubt of the title conferred by the sale under that execution. (*Hildreth* v. *Sands*, 2 Johns. Ch. 35; 14 Johns. 493; *Porter* v. *Parmley*, 52 N. Y. 185; *Best* v. *Staple*, 61 id. 71.) No demand was necessary before this action. (*Gauley* v. *F. C. N. Bank*, 98 N. Y. 487.)

John W. Pirsson for respondents. Assuming that the two chattel mortgages held by the defendants upon the property described in the complaint, and under which the sale of said property was made by them, have never been refiled as required by the statute, and that for this reason they are void as against the plaintiff, who is a judgment creditor of the mortgagor, this is not sfficient to entitle the plaintiff to recover. He must also show in addition that he has acquired some lien, legal or equitable, upon the property by virtue of his judgment, otherwise

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he cannot recover. (*Buswell* v. *Lincks*, 8 Daly, 218; *Southard* v. *Benner*, 72 N. Y. 424; *Geery* v. *Geery*, 63 id. 256; *Brinckerhoff* v. *Brown*, 4 Johns. Ch. 677; *Lane* v. *Lutz*, 1 Keyes, 203; *Thompson* v. *Van Vechten*, 27 N. Y. 568; *Jones* v. *Graham*, 77 id. 628; *Walker* v. *Henry*, 85 id. 130, 134; *Sullivan* v. *Miller*, 106 id. 635, 641; *Stewart* v. *Beale*, 7 Hun, 405; 68 N. Y. 629; *N. C. N. Bank* v. *Lord*, 33 Hun, 557, 564; *Button* v. *R. S. & Co.*, 43 id. 147, 148.) The plaintiff acquired no right, title or interest whatever in the property described in the complaint by virtue of any judgment against Sewell or of any execution sale thereunder, because the mortgagor, subsequent to the execution of the two mortgages held by the defendants and the one held by Chase, and prior to the recovery of the judgments against him, said Sewell, and prior to the pretended levies and sale by the sheriff thereunder, had executed and delivered a general assignment of all his property in trust for the benefit of all of his creditors. (106 N. Y. 635; *Wheeler* v. *Lawson*, 103 id. 40, 46; *Lichtenberg* v. *Herdtfelder*, Id. 302, 306; *Childs* v. *Kendall*, 30 Hun, 227; 101 N. Y. 625; *Crouse* v. *Frothingham*, 97 id. 105.) The plaintiff did not acquire any right, title or interest whatever in the property described in the complaint, by virtue of the alleged execution sale, and would not have acquired any right, title or interest therein, by reason of sale, even though said Sewell had not made said general assignment for the benefit of his creditors, because the defendants had reduced the mortgaged chattels to possession prior to the pretended levy and sale by the sheriff. (*Farmers' Bank* v. *Cowan*, 2 Keyes, 217; *Judson* v. *Easton*, 58 N. Y. 664; *Parshall* v. *Eggart*, 52 Barb. 367; 54 N. Y. 18; *Keller* v. *Paine*, 107 id. 83; *Powell* v. *Preston*, 1 Hun, 513; *Dutcher* v. *Swartwood*, 15 id. 31; *Q., etc., Co.* v. *Hart*, 48 id. 393; Code Civ. Pro. § 1717.) The pretended levy and sale by the sheriff under the executions in his hands were absolutely null and void; and the plaintiff acquired no right, title or interest whatever by virtue thereof. (*F. N. Bank* v. *Dunn*, 97 N. Y. 149; *Sullivan* v. *Miller*, 106 id. 635; *Walker* v. *Henry*, 85 id. 130.) To charge the defend-

ants with a conversion of the property described in the complaint the plaintiff must prove a demand and refusal, otherwise there could be no conversion by them. (1 Addison on Torts, § 471.) The defendants are not liable in their representative capacity, as executor, etc., of Richard Mortimer, deceased, for the alleged conversion mentioned in the complaint. (*Thompson* v. *Whitmarsh*, 100 N. Y. 35; *Buckland* v. *Gallup*, 105 id. 453.) Assuming that the plaintiff is entitled to recover, he cannot recover, in any event, a greater sum than the amount due under the judgment recovered by him against Sewell. (Laws of 1883, chap. 279; Laws of 1873, chap. 501; Laws of 1879, chap. 417; *Fowler* v. *Haines*, 91 N. Y. 346; *Allen* v. *Judson*, 71 id. 77.)

EARL, J. The plaintiff's title depends upon the validity of the levy and sale by virtue of the executions issued upon the judgments recovered against N. P. Sewell. His contention is that the levy and sale were valid, although the executions were issued after Chase, the mortgagee, had for default taken actual possession of the mortgaged property, and after the mortgagor had executed a valid general assignment for the benefit of his creditors. He claims that the mortgages were void as to the creditors of the mortgagor, because they were not refiled as required by the statute, and, therefore, that the mortgages were not an obstacle in the way of the executions. As to the effect of the assignment, he claims that the mortgages were valid, as between the mortgagor and mortgagee, and that the legal title, as between the mortgagor and mortgagee, had passed out of the former to the latter, and hence that the assignment at most passed to the assignee for the benefit of creditors only the right of redemption which remained in the assignor. It is difficult to state the precise ground upon which the plaintiff stands as to the assignment. It is stated thus in the points of his learned counsel: "It must not be said that because Sewell had no interest to part with, no right could accrue to plaintiff by the purchase of Sewell's interest. Plaintiff under settled authority does not depend upon any *estate which Sewell had*, but on the just though anomalous doctrine, that by his purchase

he acquired the right which Sewell's creditors had to disregard the mortgages." The defendant's claim that after default in the payment of the mortgages and particularly after possession taken by Chase under his mortgage, the mortgagor retained no right or interest in the property which was subject to levy and sale upon execution; that after the assignment whatever interest he had in the property was vested in the assignee, and thus that the assignment stood in the way of any levy upon or sale of the property by virtue of the executions, and furthermore, that while the sheriff held in his hands the writ of replevin he could not levy upon the same property by virtue of the executions. These are the main contentions of both sides, elaborately argued in the briefs submitted to us, and they present interesting questions, some of which are not easy of solution.

Without examining other questions, we think it is a sufficient answer to the plaintiff's claim of title that before the issuing of the executions under which he claims to have derived his title, a general assignment was executed by the judgment debtor for the benefit of his creditors, the validity of which is in no way assailed, which entirely divested him of the property. But for the mortgages it is conceded that the general assignment would have this effect. The plaintiff claims, however, that because the mortgages were void as to creditors, for not having been refiled according to the statute, there was something which did not pass from the judgment debtor to his assignee which the creditors, and they alone, could seize by virtue of their executions.

It is provided by the act chapter 279 of the Laws of 1833, as amended by the act chapter 418 of the Laws of 1879, that every mortgage of goods and chattels "which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section" of

the act. The next section provides for the filing of the mortgages; and the third section provides that every mortgage filed in pursuance of the act "shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of each and every term of one year after the filing of such mortgage, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk."

While the mortgage in the cases mentioned in the act is valid as between the parties thereto, it is void as to the creditors of the mortgagor. But the act confers no title to the property upon the creditors, and by virtue of the act they take no interest in it. The mortgage is not to be treated as made for their benefit, and the mortgagee does not hold the property in trust for them. The effect of the statute is simply that in the cases mentioned, as between the creditors and the mortgagor, the mortgage has no force or operation whatever, and the case is to be treated as if the mortgage had never existed. While the mortgage is void as to creditors, they cannot touch the property until they come with an execution. As between the mortgagor and the creditors, if the latter can claim that the mortgage had no existence, so also can the former make the same claim. They cannot at the same time assert its invalidity and validity. They cannot seize the property as belonging to the mortgagor, and at the same time deny that he has any title to the property. They must constantly stand upon the position that the mortgage is a nullity. As between them and the mortgagor, both parties have the right to act as if the mortgage had never existed, and before the creditors obtain a lien on the property by virtue of their executions, the mortgagor may deal with the same in any honest way. He may sell it and convey an absolute title, subject to any rights the mortgagee has; or he can deliver the property to the mortgagee in payment of the debt secured by the mortgage, or the mort-

gagee can release the debt, with or without payment, and thus invest him with an absolute title, and the creditors will have no legal ground of complaint. In this case, at any time before the execution of the assignment, Sewell could have executed new mortgages upon the property to secure the same debts, and if they had been properly filed, they would have been valid and effectual as against his creditors.

It is stated that this view of the situation entirely defeats the creditor in such a case. If that be so, it is due only to the fact that he is in the situation of every creditor who comes with his execution after the debtor has in some way parted with or become divested of his property. It may be, as claimed on the part of the plaintiff, that the assignee could not impeach the title of the mortgagees because the mortgages were not refiled, for the reason that he, by virtue of chapter 314 of the Laws of 1858, can disaffirm and treat as void mortgages only when made in fraud of the rights of creditors and as the only infirmity alleged against these mortgages is that they were not refiled, it may be that he has no greater right to assail them than the mortgagor had. If, therefore, the creditors cannot levy upon the property in a case like this, and cannot through the assignee assail the mortgages, it is difficult to see what remedy they have. It is possible that they might maintain some equitable action but it is not necessary now to determine whether they could or not maintain such an action, as this is simply an action based upon a claimed title to recover damages for the conversion of the property. The plaintiff's misfortune is due to the fact that the executions were not issued until after the assignment was made and the judgment debtor had ceased to have any interest whatever in the property.

In the case of *Porter* v. *Parmley* (52 N. Y. 185), much relied upon by the learned counsel for the appellant, the judgment debtor had executed a mortgage which the mortgagee filed, but which he had not refiled, as required by the statute, and while the property remained in the possession of the mortgagor, and before any other title intervened between him and his creditors, it was seized and sold by virtue of the execution against him,

and it was held that the purchaser at the execution sale obtained a good title. The learned judge writing the opinion in that case carefully limited the doctrine therein announced to a case where the property remained in the possession of the mortgagor, and nothing had occurred to change the relations of the parties except the forfeiture. This case would be like that if the property had been seized by virtue of the executions before the making of the assignment. The intervention of the assignment between the creditors and the property makes the difference between that case and this.

The case of *Wheeler* v. *Lawson* (103 N. Y. 40) is an authority for the views we have expressed. There Shoemaker executed a chattel mortgage to plaintiff's assignor. He subsequently made a general assignment for the benefit of his creditors. The assignee, with the consent of Shoemaker, surrendered the property to the plaintiff as assignee of the mortgage, from whose possession it was forcibly taken by the defendant, who, as sheriff, had in his hands an execution against Shoemaker, issued upon a judgment rendered after the property came into the plaintiff's possession; and it was held that the invalidity of the chattel mortgage did not justify the taking, as in such case the title to the property was in the assignee of Shoemaker, and proof of the plaintiff's possession was sufficient to sustain the action. In that case the mortgage was not filed and there, as here, it was good as between the parties thereto, and the mortgagor remained in possession until he executed the general assignment. The precise point decided in that case was that after the execution of the assignment the sheriff could not levy upon and seize the property by virtue of an execution in his hands.

The case of *Kitchen* v. *Lowery*, recently decided in the Second Division of this court, is to the same effect. There the action was brought by the plaintiff as a judgment creditor of Samuel S. Lowery and George M. Lowery, to set aside a general assignment for the benefit of creditors and two chattel mortgages made by them. One of the mortgages held by Titus Sheard was executed on the 24th

day of December, 1883; the other was executed to Nora K. Lowery on the 1st day of September, 1884. Both mortgages were filed on the 24th day of August, 1885, on which day, after the filing of the mortgages, the Lowerys made a general assignment of all their property for the benefit of their creditors. The debt of Nora K. Lowery was preferred in the assignment, it being stated therein that she held as collateral security a chattel mortgage, subject, however, to the prior mortgage of Sheard. The assignors delivered to the assignee all their property, including that covered by the chattel mortgages. On November 18, 1885, Sheard took the property under his mortgage and advertised and sold it at public auction. The trial court found that the mortgages and assignment were made in good faith and were not intended to defraud creditors. The learned judge, writing the opinion of the court, said: "Whilst the mortgagee of chattels is deemed the owner and has the right to reduce them to possession, the mortgagor has the right to redeem before sale or to receive the surplus, if any, that shall arise upon a sale. He has an interest in the property which is assignable, and such interest under a general assignment for the benefit of creditors passes to the assignee." He further said: "They (the mortgages) may be void as to creditors for the reason that they were not filed at the time their credits were given; but if creditors neglect to avail themselves of the means provided by statute to secure the payment of their claims until the mortgagor has transferred his interest to an assignee, they thereby lose the advantage which they otherwise might have gained. In such a case the assignee acquires a superior right to the individual creditor, and takes the same in trust for all the creditors. Before such transfer the creditor, upon obtaining judgment, might have secured a lien upon the personal property of the judgment debtor by the levy of an execution thereon. He might also have obtained a lien by a like levy upon the property covered by the mortgage. The mortgage being void as to him, the property would be regarded as that of the judgment debtor, and the levy would have the

same force as if no mortgage existed. But waiting until after the assignment, he loses his right to acquire a lien by levy. * * * The mortgagors, by their assignment, have transferred all of their interest therein to the assignee. The mortgagee, Sheard, has taken the property under his mortgage and sold it. The property mortgaged has now passed into the hands of the purchasers under such sale, and whatever rights the plaintiff may have had, none remain that are available to afford him relief." It is true that in each of the two cases last cited, the mortgagor was in possession of the mortgaged property at the time he executed his general assignment but that circumstance does not materially distinguish those cases from this. There was default in the mortgages involved in those cases as in this; and upon default of the mortgagor of chattels, the absolute legal title vests at once without possession in the mortgagee, and all the mortgagor has left is a right of redemption in equity, and there is no interest in the property left in him which can be seized by execution. (*Hamill* v. *Gillespie*, 48 N. Y. 556; *Porter* v. *Parmley*, *supra*; *Judson* v. *Easton*, 58 N. Y. 664; *Casserly* v. *Witherbee*, 119 id. 523; *Leadbetter* v. *Leadbetter*, 125 N. Y. 290.)

Therefore, under the general assignment of Sewell, the rights of the assignee in and to the mortgaged property were just as great as they would have been if the assignment had been executed before either of the mortgagees had taken possession of the property. After default in a chattel mortgage, the mortgagor has a beneficial interest in the property, and even after the mortgagee has taken possession, practically he holds it only as security for his debt which the mortgagor can pay, and thus he can redeem his property; and he has a real interest which he can convey, although the mortgagee has taken possession of the property.

The position of the plaintiff, therefore, is this: If he asserts the validity of the mortgages for any purpose as between the creditors and the mortgagor, then the title to the property was in the mortgagees, and was not subject to levy upon the executions. If he asserts that the mortgages were, as between

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him and the mortgagor, invalid and non-existent, then the property passed under the assignment and was out of reach of the executions.

We, therefore, see no reason to doubt that the judgment below is right, and it should be affirmed, with costs.

All concur.

Judgment affirmed.

ETTA L. ALEXANDER, Respondent, *v.* ROCHESTER CITY AND BRIGHTON RAILROAD COMPANY, Appellant.

In an action to recover damages for injuries alleged to have been caused by defendant's negligence, the testimony was to this effect: Plaintiff was riding in one of defendant's street cars; a wagon loaded with lumber was moving in the opposite direction, using the rails of another track. The driver of the wagon, after it had passed the driver of the street car and when it was abreast of the car, suddenly turned off the track; the lumber which projected beyond the wagon was, by the movement, thrust through a window of the car, and struck the plaintiff, inflicting the injury complained of. The car driver happening to look up in his mirror saw the wagon driver in the act of turning out, and he at once set the brake and stopped the car. It was claimed that the car was traveling at an unusual rate of speed. *Held*, that the evidence failed to show any negligence on the part of defendant, and the submission of the question to the jury was error; that assuming the rate of speed of the car was unusual, it had nothing to do with the accident.

Hill v. *N. A. R. R. Co.* (109 N. Y. 239), distinguished.

(Argued May 1, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 23, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries sustained by plaintiff while a passenger on one of the defendant's cars through its negligence.

The facts, so far as material, are stated in the opinion.

Statement of case.

Thomas Raines for appellant. The exception to the denial of the motion for a nonsuit was well taken. (*Searles* v. *M. R. Co.*, 101 N. Y. 661; *Taylor* v. *City of Yonkers*, 105 id. 209; *Hegeman* v. *W. R. R. Co.*, 13 id. 9; *Unger* v. *F. S. S. R. R. Co.*, 51 id. 501, 502; *Etherington* v. *P. P. & C. I. R. R. Co.*, 88 id. 643; *Adolph* v. *C. P. N. & R. R. R. Co.*, 76 id. 537; *Hubbell* v. *City of Yonkers*, 105 id. 439; *F. S., etc., R. R. Co.* v. *Gibson*, 96 Penn. St. 83; *Potts* v. *C. C. R. R. Co.*, 33 Fed. Rep. 610.) A person has a right to act on the presumption that another will conduct himself in accordance with the rights and duties of both. (*Newson* v. *N. Y. C. R. R. Co.*, 29 N. Y. 390; *Erns* v. *H. R. R. R. Co.*, 35 id. 28; *Gordon* v. *G. S. & N. R. R. Co.*, 40 Barb. 550; *Massoth* v. *D. & H. C. Co.*, 64 N. Y. 532.)

P. Chamberlain, Jr., for respondent. The defendant's motion for a nonsuit was properly denied. (*Murphy* v. *C. T. & B. R. R. Co.*, 36 Hun, 199; *Seybolt* v. *N. Y., L. E. & W. R. Co.*, 95 N. Y. 562; *Hart* v. *H. R. B. Co.*, 80 id. 622; *Payne* v. *T. & B. R. R. Co.*, 83 id. 572; *Justice* v. *Lang*, 52 id. 323; *Coleman* v. *S. A. R. R. Co.*, 41 Hun, 380; *Bowen* v. *N. Y. C. R. R. Co.*, 18 N. Y. 410; *Brown* v. *N. Y. C. R. R. Co.*, 34 id. 404; *Weber* v. *N. Y. C. R. R. Co.*, 58 id. 461; *Stewart* v. *C. R. R. Co.*, 90 id. 592; *Feeney* v. *B. C. R. R. Co.*, 36 Hun, 198; *Morse* v. *Bogart*, 4 Den. 108; *Scofield* v. *Hernandez*, 47 N. Y. 313; *Thompson* v. *Luneby*, 50 How. Pr. 103; 66 N. Y. 631; *King* v. *City of Troy*, 104 id. 352; *Alberti* v. *N. Y., L. E. & W. R. R. Co.*, 43 Hun, 421; *Caldwell* v. *N. J. S. Co.*, 47 N. Y. 282; *Murphy* v. *C. I. & B. R. R. Co.*, 36 Hun, 200; *Barrett* v. *T. A. R. R. Co.*, 45 N. Y. 632; *Payne* v. *T. & B. R. R. Co.*, 83 id. 574; 58 id. 126, 613; *Carroll* v. *S. I. R. R. Co.*, 57 id. 126; *Barrett* v. *T. A. R. R. Co.*, 8 Abb. [N. C.] 216.) No error was committed by the court in the reception or rejection of evidence. (*Adolph* v. *C. P., N. & E. R. R. R. Co.*, 76 N. Y. 530; *Massoth* v. *D. & H. C. Co.*, 64 id. 524; *Hill* v. *N. A. R. R. Co.*, 109 id. 239; *McCain* v. *B. C. R. R. Co.*, 116 id.

459; *Turner* v. *City of Newburgh*, 109 id. 301; *Griswold* v. *N. Y. C. & H. R. R. Co.*, 44 Hun, 236; 115 N. Y. 61.) No error was committed by the court in refusing to charge as requested by defendant's counsel. (*Barrett* v. *T. A. R. R. Co.*, 45 N. Y. 634; *Caldwell* v. *S. B. Co.*, 47 id. 286; *Conly* v. *Meeker*, 85 id. 618; *Reymond* v. *Richmond*, 88 id. 671; *Esmond* v. *Kingsley*, 19 N. Y. S. R. 665.) The verdict was not excessive. (*Gale* v. *N. Y. C. R. R. Co.*, 13 Hun, 1; *McShean* v. *N. Y. C. R. R. Co.*, 6 Alb. L. J. 110; *Whiteman* v. *Leslie*, 54 How. Pr. 494; *Daly* v. *Byrne*, 11 J. & S. 261; *Bierbeaur* v. *N. Y. C. R. R. Co.*, 15 Hun, 559; *Bowles* v. *R., W. & O. R. R. Co.*, 46 id. 327; *Avery* v. *N. Y. C. & H. R. R. Co.*, 17 N. Y. S. R. 426; *Minic* v. *City of Troy*, 19 Hun, 253; *Coppins* v. *N. Y. C. & H. R. R. Co.*, 48 id. 300; *Walker* v. *E. R. R. Co.*, 63 Barb. 260; *Harrold* v. *N. Y. E. R. R. Co.*, 24 Hun, 184; *Groves* v. *City of Rochester*, 39 id. 11; *Murray* v. *H. R. R. R. Co.*, 47 Barb. 200; *Hickenbottom* v. *D., L. & W. R. R. Co.*, 15 N. Y. S. R. 11.)

GRAY, J. Upon the trial of this action I think the plaintiff failed to make out a case of negligence against the defendant, and, therefore, established no right to recover damages for the injuries she has sustained. The evidence is utterly wanting, in this record, from which it might be inferred that the accident was in the slightest degree attributable to any act of omission or commission on the part of the car driver. Her own narrative of the occurrence and that of her witness, a fellow passenger, do not conflict with the car driver's version, and it is plain and above any reasonable doubt, that the incident was one, which no one, in the exercise of ordinary human foresight, or of that prudence, which should characterize human action, when entrusted with responsibility towards others, could have anticipated. The horse-car, in which the plaintiff was riding, was proceeding on its way, in the city of Rochester, upon the northernmost of the two tracks of the defendant's road. Coming in the opposite direction and using the rails of the other track was a wagon, heavily loaded with lumber. When this wagon

was abreast of the car, its driver suddenly turned off the track, and, in doing so, the ends of the lumber, which projected from the after part of the wagon, were jerked, or thrust, by the sudden movement of turning, through one of the car windows; striking the plaintiff a blow in the back. At the moment, she was rising from her seat to pull the car strap, for the purpose of signalling the driver to stop at the street corner they were nearing. Her eye glancing out of the car caught a view of the wagon. When asked as to what she saw, she testified "It was on the opposite track, turning off from it; it was about at right angles when I saw it." Then, more particularly, she testified: "He (the wagon driver) was turning off the track at the time of this occurrence. * * * He was at about right angles with the track when I saw it; this was at the time, at the moment, that I was struck, at the moment the lumber came through the window; he was then at about right angles; I had not observed him turning off the track before I was struck; I saw him just at the time; * * * my attention happened to be drawn off that way so as to notice him before I was hit." Again she describes the occurrence: "We were going in opposite directions; this lumber wagon and team were going up the street, as we call it, and I was riding down; the teams had passed each other, the teams of the car and lumber wagon, and the drivers had passed by each other; and as much of the car as was in front of me had passed by the lumber wagon and its load; I did not observe the driver of the lumber wagon when he commenced to turn. Q. You observed the act of turning? Ans. As he was turning. Q. And then almost immediately after you observed his act of turning you were struck? Ans. It was all at the same time and I was struck by the ends of the rear of the load * * *."

The driver is the only other witness in the case, whose evidence gives any information about the movements of the wagon. From his account, it appears that when he first saw the wagon it was coming towards him on the other track, following behind a street car. The road was clear before him and he was going along, passing the car and wagon, with noth-

ing to attract his attention, when, happening to look up in his mirror, he saw the wagon driver in the act of turning out and he at once set his brake and stopped his car, fearing some injury from the load. He testified that neither at the time when the team of the lumber wagon passed his team, nor when the wagon passed, had he seen any movement towards turning out. The whole load had gone by him and it was owing to his glancing into his mirror that he noticed the sudden movement of the lumber teamster and was enabled to set his brakes to arrest his own motion. The suddenness and rapidity, with which the car was struck by the wagon load, are evidenced by the fact that the breaking of the car window pane was the only damage inflicted upon the car. The woodwork was not even touched. This proved the striking of the car to have been caused by the jerk, or violent movement necessarily imparted to the wagon body by the driver's attempt to take his wagon wheels so abruptly out of the rails. The driver of the wagon was never found and the description of the incident is thus confined to the testimony of the plaintiff and the car driver, which agrees as to these essential features. The testimony of the witness, who was a passenger in the car, relates only to what took place at the time the plaintiff was struck; except that he testifies to the rapid rate at which the car was proceeding. And the evidence as to the high rate of speed constitutes, in effect, the only real basis upon which the respondent's counsel founds his argument in support of this large and extraordinary recovery. He claims that "the approximate cause of the accident and injury was the high and dangerous rate of speed at which the car was being driven," and he argues that if the driver had been proceeding at a more moderate speed, he could have stopped his car and avoided the collision. I do not perceive the force of this argument. Assuming the rate of speed to have been unusual, even, the speed of the car had nothing to do with the occurrence. The track was clear ahead of the car driver; the lumber wagon was where it could not possibly collide with the car and there was nothing to indicate to the car driver that the teamster

intended to change the course of his wagon. He had every right to suppose, if there was reason for his dwelling upon the very common occurrence of a wagon using the other track, that it would not turn off in the middle of a block, but that it would continue on. It cannot be assumed from the evidence what, if the car had been running at a slow rate of speed, would have been the result of the wagon driver's act of suddenly turning off the rails. If conjecture were admissible, it might bear either way upon the causes of this occurrence. If I were to conjecture upon the effect of the rapidity of the car's movement, I should incline to the supposition that it may have prevented a severer collision. The facts of the case permit no inference of fault in the driver. He had nothing to warn him, or even to suggest to him an impending, or possible collision of the wagon with any part of his car. He was evidently alert; for he had his brake so well in hand as to be able to stop the car at once. He was not bound to infer the existence of danger from the approach of a wagon upon the other track. So far as he was concerned in the causes of the plaintiff's injuries, his action was no more a procuring element than if, when abreast of the car, the wagon driver had suddenly turned his team and intentionally driven his pole or wagon into the car. The driver of the wagon had a right to use the street railway track and his use of it would have led to no injurious result in this case, if, in order to leave it at that place, he had not turned his wheels so abruptly as to throw, or swing the end of his wagon body around and against the passing car. It was his negligent and reckless act which directly caused the injury to the plaintiff and the case fails to disclose any neglect on the driver's part, which co-operated to occasion that result. As the case stood upon the evidence, no inference was permissible that the defendant had failed in its obligation to carry the plaintiff with that care and vigilance, which are imposed by law upon such a carrier of passengers, and to allow the jury to pass upon the issue was to invite a verdict for the plaintiff, based solely upon a sympathy for her suffering. It was distinctly error in the trial judge to deny the motion for a nonsuit.

Statement of case.

The judgment was sought to be upheld, below, by reference to the case of *Hill* v. *Ninth Ave. R. R. Co.* (109 N. Y. 239). That decision is not in point. There the street car, while moving at unusual speed, was struck by the pole, or shaft, of a truck, which penetrated the front panels of the car, with force sufficient to injure a passenger. Plainly enough, such an occurrence suggested some possible negligence in the car driver and called for some explanation of such a collision. An inference was justifiable, on the plaintiff's proof, that the car driver might have avoided the collision, or lessened its effect, and, therefore, it was error to dismiss the complaint. The very nature of the accident in that case raised the inference that the driver must have been reckless and that there might have been some way to avoid it by prudent driving; while here there was only reason to believe that the car driver could have done nothing to avoid the consequences of the teamster's conduct.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

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128 19
160 196

CROFT C. CARROLL, Respondent, *v.* CLAYTON E. SWEET, Appellant.

While, as between the holder and drawer of a check, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer, unless loss has resulted to him, a different rule obtains as between holder and indorser.

The holder, on accepting the check, assumes the obligation to present the same for payment within the time prescribed by the law merchant, *i. e.*, not later than the next day after its date, and if payment is refused, to protest the same and give notice of non-payment. A failure to do this discharges the indorser from liability as such, irrespective of any question of loss or injury.

In an action to recover the balance of an indebtedness for services rendered, in which the defense was payment, it appeared that one W. gave his check to defendant for the amount of a loan. Defendant, on the same day, indorsed and delivered it to plaintiff at the place where the bank on which it was drawn was located, to apply upon the indebtedness in

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suit. W. requested plaintiff to hold the check for a few days, stating if plaintiff would let him know when he wished to use the check, he would then provide for it. W. testified on the trial that he had then enough money to pay the check and would have paid it had payment been insisted upon. Plaintiff kept the check for nine days before he presented it for payment. W. in the meantime had become insolvent. The cashier of the bank on which it was drawn testified that there were no funds to meet it, and it would not have been paid if it had been presented any time after the day of its date. There was no agreement that the check in suit should be taken in absolute satisfaction of the debt. The court directed a verdict for the plaintiff. *Held*, error; that the delay in presenting the check discharged defendant from liability as indorser; that the delay was not excused by the fact that the drawer had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment; that while the indorsement and transfer of the check operated as a provisional payment only, if the delay caused a loss to defendant, to the extent of the loss the delay was tantamount to actual payment; that as there was evidence tending to show that the delay prevented a collection of the check in whole or in part, and that so much was lost to defendant, the case should have been submitted to the jury.

(Submitted May 4, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 9, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and affirmed an order denying a motion for a new trial.

This was an action to recover the balance of an indebtedness for services rendered. The defense of payment by check was interposed.

The facts, so far as material, are stated in the opinion.

H. E. Losey and *J. W. Bartram* for appellant. The plaintiff was guilty of *laches* in dealing with the Woodruff check; when he accepted the check he assumed the duty of causing proper demand of payment to be made, and notice of non-payment to be duly given to the defendant as indorser. (*Cromwell* v. *Lovett*, 1 Hall, 56; *Murray* v. *Judah*, 6 Cow. 484; *Smith* v. *Miller*, 43 N. Y. 171; *Burkhalter* v. *S. N. Bank*, 42 id. 538; *M. Bank* v. *Broderick*, 13 Wend. 134; *Alexander* v.

Burchfield, 7 M. & G. 1061.) By reason of the plaintiff's neglect to make due demand and give due notice of the dishonor of the check in question, he discharged the defendant from all liability either upon the check or upon the indebtedness for which it was transferred to the plaintiff. (*Smith* v. *Miller*, 43 N. Y. 171; Daniels on Neg. Inst. § 1587; 52 N. Y. 545; *C. Bank* v. *Hughes*, 17 Wend. 98; *Clift* v. *Rodgers*, 25 Hun, 39; *People ex rel.* v. *Cromwell*, 102 N. Y. 477.)

Carter, *Hughes & Kellogg* for respondent. The Woodruff check was received by the plaintiff as conditional payment. (*Bradford* v. *Fox*, 38 N. Y. 290; *Tobey* v. *Barber*, 5 Johns. 68; *Noel* v. *Murray*, 13 N. Y. 167, 172; *Buswell* v. *Pomier*, 33 id. 312.) The liability of the defendant upon the original debt is not to be determined by his liability as indorser. (*Hamilton* v. *Cunningham*, 2 Brock. 500; *Gallagher* v. *Roberts*, 2 Wash. C. C. 191; *Flieg* v. *Sleet*, 43 Ohio St. 53.) The Woodruff check was not available to the plaintiff as a means of obtaining payment of his claim. (*Sutter* v. *Vandeveer*, 122 N. Y. 653.) No loss was occasioned to the defendant by the delay in the presentation of the check. (*Carroll* v. *Sweet*, 25 J. & S. 107; Daniels on Neg. Inst. § 1596; *F. N. Bank* v. *F. N. Bank*, 77 N. Y. 320; *S. R. R. Co.* v. *Collins*, 57 id. 644; *Bradford* v. *Fox*, 38 id. 290.)

ANDREWS, J. The indorsement and transfer by the defendant to the plaintiff of the check to Woodruff operated as provisional payment only of so much of the antecedent debt owing by the defendant to the plaintiff. There was no agreement that it should be taken in absolute satisfaction of the debt and, in the absence of such an agreement, the intendment of law is that it was conditional payment only. (*Hill* v. *Beebe*, 13 N. Y. 566; *Bradford* v. *Fox*, 38 id. 289.) The debt remained until discharged by payment of the check or by such dealing with the check by the plaintiff as would, in judgment of law, convert what was originally a provisional payment into an absolute one. The check was dated

August 22, 1887, and was drawn on the Asbury Park National Bank and was on the same day indorsed and delivered by the defendant to the plaintiff at the place where the bank was located.

The plaintiff on accepting the check assumed, as between himself and the defendant, an obligation to present the same to the bank for payment within the time prescribed by the law merchant, that is to say, not later than the next day after its date, and if refused, to protest the same and give notice of non-payment. (*Smith* v. *Janes*, 20 Wend. 192.) It was not presented until the thirty-first of August, nine days after it was received by the plaintiff. The defendant was, by such delay, discharged from liability as indorser of the check, irrespective of any question of loss or injury. Presentment in due time, as fixed by the law merchant, was a condition upon performance of which the liability of the defendant as indorser depended, and this delay was not excused although the drawer of the check had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment. (*Mohawk Bank* v. *Broderick*, 10 Wend. 304; *Gough* v. *Staats*, 13 id. 549.) A different rule obtains as between the holder and drawer of a check. As between them presentment may be made at any time and delay in presentment does not discharge the liability of the drawer unless loss has resulted. (*Little* v. *Phenix Bank*, 2 Hill, 425.)

The action here is not upon the indorsement of the defendant, but upon the original indebtedness. If the discharge of the defendant's liability as indorser discharges also his liability as debtor for the original debt, the judgment must on that ground be reversed. In *Hamilton* v. *Cunningham* (2 Brock. 350), Chief Justice MARSHALL considered the effect of the neglect of the holder of a bill to give due notice of dishonor, whereby prior parties thereto were discharged, upon the liability of a debtor for the debt for which the bill was drawn. After showing that the authorities in which the debtor had been held discharged, proceeded upon the theory that he had sustained

an actual loss, reached the conclusion that the true principle is "that if a bill be received as provisional payment, the omission to give due notice of its dishonor, deprives the creditor of his action on that bill, but does not compel him to take it in absolute payment or deprive him of his action on the original debt further than damage has been sustained actually or in legal supposition by the debtor." (See also *Gallagher's Exrs.* v. *Roberts*, 2 Wash. C. C. 191; *Fleig* v. *Sleet*, 43 Ohio St. 53.) I am not sure that this doctrine is reconcilable with expressions in the opinion of this court in *Smith* v. *Miller* (43 N. Y. 171; *S. C.*, 52 id. 545.) That was an action to recover a debt for which the defendant had drawn his draft on J. K. Place & Co., and forwarded it to the plaintiff, the creditor. It was presented on the same day it was received to the drawees, and the plaintiffs received therefor the drawee's check on a bank and surrendered the draft. The check was not presented to the bank until the next day, when payment was refused, the drawee meanwhile having failed. The check would have been paid if it had been presented on the day it was given, which might have been done. The plaintiffs did not demand a return of the draft, and it was not protested, nor was any notice of non-payment given to the drawees. The court rendered judgment for the defendant on two grounds, *first*, that in the absence of proof of demand and refusal and notice to the drawees, according to the usual course, there could be no recovery upon the draft or upon the indebtedness upon which it was given, and *second*, on the ground of negligence in failing to present the check on the day on which it was given. The last ground stated was upon the facts a satisfactory basis for the judgment, and the same principle was applied upon similar facts in *First National Bank* v. *Fourth National Bank* (77 N. Y. 320).

In the view we take of the present case, it is unnecessary to inquire whether the cases cited from this and other courts are in conflict, or if so which class of cases stand upon the better reason. The court in this case directed a verdict for the plaintiff, and in this we think there was error. It cannot be

doubted that if there was evidence tending to show that the delay in presenting the check to the Asbury Park Bank prevented its collection, or from which the jury might find that the whole, or any part of the debt owing by the drawer of the check to the defendant, for which the check was given, was lost by reason of the delay in the presentment, or by dealings between the plaintiff and the drawer, in respect to the check, without the assent of the defendant, the case should have been submitted to the jury. To the extent of the injury, the law would treat the omission to make due presentment as tantamount to payment.

The facts most favorable to the defendant need to be stated. Woodruff, the maker of the check, when the check was given, was conducting a hotel at Asbury Park, and the parties to the action were guests at his house. The defendant was indebted to the plaintiff for dentistry work, and the former, who resided in New York, had loaned money to Woodruff for which the check was given, and on same day defendant received the check he delivered it to the plaintiff on his debt. Woodruff had an account with the Asbury Park National Bank. On the day of the date of the check the bank charged to his account a demand note held by the bank against him for $500, but so far as appears without any notice to Woodruff, and this rendered his bank account overdrawn. Woodruff was in embarrassed circumstances, but was in the daily receipt of about $600 from his business. He used part of the receipts for current expenses, without depositing them, and between the twenty-second and thirty-first of August he deposited $900 in the bank to the credit of his account, and the inference is that it was applied in part to pay the $500 note and in part to pay current checks drawn by Woodruff. On the twenty-second of August, the day on which Woodruff's check to the defendant is dated, and after it had been indorsed to the plaintiff by the defendant, Woodruff, who had been informed of the transfer, requested the plaintiff to accommodate him by holding the check a few days, stating as a reason that he was pressed in the payment of his accounts, to

which request the plaintiff assented. He asked the plaintiff to let him know when he wished to use the check, as he would then provide for it. Woodruff testified that he had money in his office sufficient to pay the check, and would have paid it at any moment had payment been insisted upon; that he was in the receipt of about $600 a day, and that he redeemed a number of other checks which went to protest at this time; that two or three days after the conversation of the twenty-second of August he spoke to the plaintiff again, and the plaintiff informed him that he had sent the check west. Woodruff said to him that he regretted it very much, as he wished to make provision for the check. The cashier of the bank testified that there were no funds to meet the check, and that it would not have been paid if it had been presented any time after the twenty-second of August. On August thirty-first Woodruff, who was behind in his rent, was dispossessed from the hotel premises and his business was closed and he then was and now is insolvent.

It may be conceded that the only obligation upon the plaintiff, as between him and the defendant, was to present the check at the bank for payment within the time prescribed by law, and if payment was refused, to have the same protested and notice of non-payment given to the defendant. If he had performed this duty the defendant would have been apprised of the default and he would have had an opportunity to take such measures as he could to secure payment from Woodruff. One of the objects of requiring prompt notice to be given to indorsers and other parties secondarily liable on commercial paper, in case of default, is that they may have an opportunity to secure themselves. Checks are supposed to be drawn against funds of the drawer and *prima facie* where it is shown that the drawer's account was not good, the inference of injury from non-presentment would be rebutted. But where, as in this case, it is shown that the maker of the check was solicitous that it should be paid, that he had the means of payment at command and would have provided for or paid the check if payment had been insisted upon; that

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the holder was apprised of the facts and for the accommodation of the maker refrained from presenting the check, and presentation was delayed until open insolvency of the maker occurred and he became, by the change of circumstances, unable to provide for the check, it cannot be said, we think, that there was no legal evidence of injury to be submitted to the jury. The plaintiff, instead of taking the usual course, undertook to deal with the maker of the check in disregard of his primary obligation to the defendant. It was for the jury to pass upon the circumstances and to find whether the conduct of the plaintiff imposed a pecuniary injury upon the defendant. To the extent of such injury the law adjudges that the debt of the plaintiff has been paid.

The judgment below should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

128	26
128	370
128	26
138	497
128	26
160	196
128	26
165	137
128	26
172	*107
172	*108

SAINT NICHOLAS BANK of New York, Appellant, *v.* THE STATE NATIONAL BANK, Respondent.

A bank receiving commercial paper for collection is, in this state, in the absence of a special agreement, liable for a loss occasioned by the default of its correspondents or other agents selected by it to make the collection.

Where the sub-agent makes the collection, but fails to pay over the proceeds and is insolvent, the insolvency does not shield the collecting agent from liability for the loss.

Judicial expositions by a court of another state of rules of the common law applicable to commercial transactions, do not bind the courts of this state.

Plaintiff, a banking corporation organized and doing business in the city of New York, in the usual course of business, sent to defendant, a similar corporation doing business in the city of Memphis, a check drawn upon a Texas bank for collection. Plaintiff had for two years been accustomed to send commercial paper to defendant for collection, including paper payable in Texas. Defendant received the check, indorsed it for collection and forwarded it to A. & L., its correspondents in Texas, who were bankers in good standing. A. & L. collected the check and remitted to defendant their sight draft for the amount drawn by them upon a firm in New York city. Defendant received the draft and

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forwarded it to a New York bank for collection. Said bank presented it to the payors; they had suspended payment and payment was refused. The draft was accordingly protested and returned to defendant; the latter mailed it to plaintiff, but plaintiff refused to accept it. In an action to recover the proceeds of the check, *held*, that plaintiff was entitled to recover.

Indig v. *N. C. Bank* (80 N. Y. 100), distinguished.

Defendant claimed the contract was a Tennessee contract, and that under the law of Tennessee it was not liable. For the purpose of showing the law of that state, it put in evidence a decision of the Supreme Court in that state not based upon a statute, but upon the principles of common law supposed to be applicable to the facts in that case. *Held*, that the decision was not binding upon the courts of this state.

It did not appear how or in what manner the contract between the parties was made. *Held*, the claim that the contract was a Tennessee contract was not sustained; that, in the absence of proof, it could not be assumed the contract was made in Tennessee, nor could it be regarded as a Tennessee contract for the reason that it was to be performed there; as, so far as the check was concerned, the performance was to be in Texas and New York.

(Argued May 4, 1891; decided June 2, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 13, 1891, which reversed a judgment in favor of plaintiff entered upon a verdict directed by the court and granted a new trial.

This action was brought to recover the proceeds of a draft for $473.57 sent for collection by the plaintiff to the defendant, and paid to the defendant's correspondents. The trial resulted in the direction of a verdict for the plaintiff for the amount demanded upon appeal to the General Term, the judgment entered upon the verdict was reversed and a new trial ordered. From the order of reversal the plaintiff appeals to this court.

There is no controversy as to the facts, which for the most part were set forth in a stipulation read upon the trial. They may be summarized as follows:

The plaintiff is a corporation organized under the laws of the state of New York, and engaged in the business of banking in the city of New York; and the defendant is a corporation organized under the National Banking Act, and doing business in the city of Memphis.

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For two years prior to the 18th day of November, 1884, the plaintiff had been accustomed to send checks, notes and drafts to the defendant for collection, including such as were drawn upon persons residing at a distance, in the state of Texas and elsewhere. The commercial paper was enclosed in letters, consisting of printed forms, filled out by the insertion in writing of the date, the name of the defendant's cashier, and a description of the enclosure. The checks and drafts were collected by the defendant, and the proceeds were remitted to the plaintiff, less one-fourth of one per cent, the defendant's commission, and the expense incurred in making distant collections.

On November 10, 1884, the plaintiff was the owner and holder of a check for $473.57, dated November 6, 1884, drawn upon the City National Bank of Dallas, Texas, by A. D. Aldridge & Co., and payable to the order of Henry Levy & Son. This check was indorsed by the plaintiff to the defendant for collection, and was sent to the latter in the usual course of business.

The defendant received the check on November 13, 1884, and on that day indorsed it for collection and forwarded it by mail to the firm of Adams & Leonard, at Dallas, Texas. They were at the time, and had been for many years bankers in good standing at Dallas, and the correspondents of the defendant. They received the check on November 17, 1884, and on that day duly presented it for payment to the bank upon which it was drawn, and it was immediately paid, and the proceeds were received by them. They then remitted to the defendant a sight draft for the amount collected, drawn by them upon Jemison & Co. of the city of New York. This draft was sent by the defendant for collection to the First National Bank of New York, and on November 24, 1884, was presented to Jemison & Co., who, in the meantime, had suspended payment. The draft was accordingly protested and returned to the defendant; thereupon, the defendant, on November 28, 1884, mailed the protested draft to the plaintiff and the plaintiff refused to accept it. Adams & Leonard had failed in business before the draft on Jemison & Co. was presented for payment.

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The only evidence offered by the defendant in opposition to these facts was proof of a decision of the Supreme Court of Tennessee, in the case of *Bank of Louisville* v. *First National Bank of Knoxville*, which is referred to in the opinion.

Charles E. Hughes for appellant. A bank receiving a bill of exchange in one state for collection from a drawee residing in another state, in the absence of a special agreement, is liable for a loss occasioned by the default of its correspondents selected to effect the collection. (*Allen* v. *M. Bank*, 22 Wend. 215; *M. C. Bank* v. *A. C. Bank*, 3 Seld. 459; *C. Bank* v. *U. Bank*, 11 N. Y. 203; *Ayrault* v. *Pacific Bank*, 47 id. 570; *Naser* v. *F. N. Bank*, 116 id. 498; *E. N. Bank* v. *T. N. Bank*, 112 U. S. 282; *Titus* v. *M. N. Bank*, 35 N. J. L. 588; *Wingate* v. *M. Bank*, 10 Penn. St. 104; *Reeves* v. *S. Bank*, 8 Ohio St. 465; *Tyson* v. *S. Bank*, 6 Blackf. 225; *Simpson* v. *Waldby*, 30 N. W. Rep. 199; *Power* v. *Bank*, 35 Alb. L. J. 185; *Mackersy* v. *Ramsays*, 9 Cl & Fin. 818.) The liability of a collecting bank extends not only to the acts of its correspondents by which the collection is defeated, but to a failure to remit the proceeds of the commercial paper when collected. (*Bradstreet* v. *Everson*, 72 Penn. St. 124.) The insolvency of its correspondents furnishes no excuse for the defendant's failure to remit the proceeds of the collection. (*Mackersy* v. *Ramsays*, 9 Cl. & Fin. 818; *Simpson* v. *Waldby*, 30 N. W. Rep. 199; *Bradstreet* v. *Everson*, 72 Penn. St. 124; *Reeves* v. *Bank*, 8 Ohio St. 465; *Hoover* v. *Wise*, 91 U. S. 308; *E. N. Bank* v. *T. N. Bank*, 112 id. 282.) The draft drawn by Adams & Leonard to the order of the defendant and tendered by the latter to the plaintiff was not a remittance of the proceeds of the collection. (*People* v. *Bank of Dansville*, 39 Hun, 189; *Indig* v. *N. C. Bank*, 80 N. Y. 100; *Briggs* v. *C. N. Bank*, 89 id. 182.) The law of Tennessee furnishes no defense. (*Monroe* v. *Douglass*, 5 N. Y. 447; *Schoonmaker* v. *Bonnie*, 119 id. 565; *Volkening* v. *DeGraff*, 81 id. 268; *Williams* v. *Birch*, 6 Bosw. 674; *Rowe* v. *Comley*, 11 Daly. 317; *Bank of Louisville* v. *F. N. Bank*, 8 Baxter, 101;

Dickinson v. *Edwards*, 77 N. Y. 573; *Leavenworth* v. *Brockway*, 2 Hill, 202; *F. N. Bank* v. *F. N. Bank*, 77 N. Y. 320; *Swift* v. *Tyson*, 16 Pet. 19; *Oates* v. *N. Bank*, 100 U. S. 239; *Faulkner* v. *Hart*, 82 N. Y. 413.)

A. Walker Otis for respondent. The contract was a Tennessee contract and should be governed by Tennessee laws. (*Buell* v. *Chapin*, 99 Mass. 594; *Gurney* v. *Howe*, 9 Gray, 404; *Crane* v. *Pratt*, 12 id. 348; *M. Bank* v. *M. Bank*, 6 Metc. 26; Morse on Banking, §§ 265, 287; Meacham on Agency, § 515.) The New York bank, by voluntarily placing collections in the hands of the Memphis Bank by implication agreed that such collections might be made subject to exemption from liability for the defaults of sub-agents. (Whart. on Confl. of Laws, § 405; *Owings* v. *Hull*, 9 Pet. 607; Morse on Banking, § 9; *Bank of Washington* v. *Triplett*, 1 Pet. 25; *Ayrault* v. *P. Bank*, 47 N. Y. 570; *Walls* v. *Bailey*, 49 id. 464.)

EARL, J. The rule has long been established in this state that a bank receiving commercial paper for collection, in the absence of a special agreement, is liable for a loss occasioned by the default of its correspondents or other agents selected by it to effect the collection. (*Allen* v. *Merchants' Bank*, 22 Wend. 215; *Montgomery County Bank* v. *Albany City Bank*, 7 N. Y. 459; *Commercial Bank* v. *Union Bank*, 11 id. 203; *Ayrault* v. *Pacific Bank*, 47 id. 570; *Naser* v. *First National Bank*, 116 id. 498.) And the same rule prevails in some of the other states, in the United States Supreme Court and in England. (*Titus* v. *Mechanics' National Bank*, 35 N. J. L. 588; *Wingate* v. *Mechanics' Bank*, 10 Pa. St. 104; *Reeves* v. *State Bank*, 8 Ohio St. 465; *Tyson* v. *State Bank*, 6 Blackf. 225; *Simpson* v. *Waldry*, 30 N. W. Rep. [Mich.] 199; *Mackersy* v. *Ramsays*, 9 Cl. & Fin. 818.) In such a case the collecting bank assumes the obligation to collect and pay over, or remit the money due upon the paper, and the agents it employs to effect the collection, whether they be in its own banking house or at some distant place, are its agents, and in

no sense the agents of the owner of the paper. Because they are its agents it is responsible for their misconduct, neglect or other default.

Here when this money was received by Adams & Leonard, the defendant's agent, it was, in fact, received by it, and it became absolutely bound to pay or remit the same to the plaintiff. It is difficult to see upon what principle the defendant could be held liable if Adams & Leonard, its agents, had carelessly failed to collect the draft, or had collected it and then purposely misappropriated the proceeds thereof, and yet not be liable for their failure to pay over the proceeds in consequence of their unexplained insolvency. Upon what principle can the defendant be held liable for one default of their agents and not for every default. That the insolvency of the sub-agent in such a case does not shield the collecting agent from responsibility for the loss has been decided in several cases quite analogous to this. (*Reeves* v. *State Bank*; *Simpson* v. *Waldry*; *Mackersy* v. *Ramsays*, *supra*; *Bradstreet* v. *Everson*, 72 Pa. St. 124.) It is not needful now to vindicate the principle upon which these cases rest, as that has been sufficiently done by learned judges writing the opinions therein. They are well supported by many analogous cases in other branches of the law, and it is believed they lay down the best and safest rule and subserve the wisest commercial policy.

The case of *Indig* v. *National City Bank* (80 N. Y. 100) is not opposed to these views. There the defendant received a note for collection which was payable at the bank of Lowville, and it sent the note directly to that bank for payment, which on the next day sent a draft for the amount of the note to the defendant and failed before the draft reached its destination, and it was held that the loss did not fall upon the defendant. That conclusion was reached by holding that the Lowville bank was not the agent of the defendant, but that the defendant was in the same position as if it had sent the note to some agent and he had received the proceeds thereof and had then bought a draft on New York of the Lowville bank for the amount, and the bank had then failed before the

draft was paid. The defendant there would have been held liable if the Lowville bank had been its agent for the collection of the note. (*Briggs* v. *Central National Bank*, 89 N. Y. 182.)

After Adams & Leonard had received payment of the draft they drew a draft upon Jemison & Co. for the amount, and sent that to the defendant for the purpose of discharging their obligation to the defendant. That draft was not made for the purpose of remitting the proceeds of the collection to the plaintiff, and was not used by the defendant for that purpose. It sent the draft to the First National Bank of New York for collection, intending afterward to remit the proceeds of the collection to the plaintiff in some other way. After Adams & Leonard and Jemison & Co. had failed, it sent the worthless draft to the plaintiff. By so doing it did not discharge its obligations to the plaintiff. If Adams & Leonard had purchased a draft of the Dallas bank and sent that to the plaintiff, or if it had sent the draft to the defendant, and the latter had then sent it to the plaintiff, then, according to the doctrine of *Indig* v. *National City Bank*, the defendant would not have been responsible for the continued solvency of the Dallas bank. That case was much discussed here, and there was much difference of opinion about it. It is a border case and its doctrine should not be much extended.

The defendant, however, claims that the contract with the plaintiff is to be treated as a Tennessee contract, and that by the law of that state it cannot be made liable for this loss. Upon the trial, for the purpose of showing the law of that state, it put in evidence a decision of the Supreme Court in the case of *Bank of Louisville* v. *First National Bank of Knoxville* (8 Baxter, 101). In that case a bill of exchange payable at the First National Bank of Knoxville, was sent by a New York bank to the Bank of Louisville for collection. It was transmitted by the Louisville bank to the Knoxville bank, was received by the latter and was subsequently returned unpaid. The cashier of the Knoxville bank delivered the bill to a notary public in good repute at the time, who failed to protest it, by

reason of which the right of action against the drawer was lost. The Louisville bank paid the amount of the bill to the New York bank, and then brought suit to recover against the Knoxville bank, and failed. It was held that "where a bank receives a bill of exchange for collection payable at a distant place, its liability is discharged by transmitting the same in due time to a suitable and responsible bank or other agent at the same place of payment, and in such case the principal's assent to the employment of a sub-agent is implied," and that "if a debt be lost by negligence of an agent to whom a bill of exchange is sent for collection, the principal or home bank (having complied with its duty, and not being liable to the holders) cannot, by voluntarily discharging the claim of the payee, maintain an action on the case for negligence against the sub-agent. Such right accrues only to the holder or payee of the bill under the circumstances." That decision was not based upon any statute law, but upon the principles of the common law supposed to be applicable to the facts of the case. It did not make or establish law, but expounded the law and furnished some evidence of what the law applicable to that case was — evidence which other courts might or might not take and receive as reliable and sufficient, and even the same court, upon fuller discussion and more mature consideration, might in some subsequent case refuse to take the same view of the law. There is no common law peculiar to Tennessee. But the common law there is the same as that which prevails here and elsewhere, and the judicial expositions of the common law there do not bind the courts here. The courts of this state and of other states and of the United States would follow the courts of that state in the construction of its statute law. But the courts of this state will follow its own precedents in the expounding of the general common law applicable to commercial transactions, and so it has been repeatedly held. (*Faulkner* v. *Hart*, 82 N. Y. 413; *Swift* v. *Tyson*, 16 Peters, 1; *Oates* v. *National Bank*, 100 U. S. 239; *Ray* v. *Western Penn. Natural Gas Co.*, 138 Penn. St. 576.) We must,

therefore, hold that the obligation resting upon the defendant was that which the principles of the common law as expressed by the courts of this state placed upon it.

If it be said that the contract between these parties was made in view of the common law, then we must hold that it was the common law as expounded here.

But it cannot be maintained that the contract between these parties was a Tennessee contract. It is by no means clear even that it can be held that the contract was made there. It does not certainly appear where it was made. It cannot be said that a new contract was made every time a piece of paper was sent by the plaintiff to the defendant for collection. There was a general contract between the parties which was either created by some negotiation or which grew out of the course of business between them, that the defendant should collect the paper sent to it for the compensation to be allowed. If that contract was made by correspondence, the plaintiff making a proposition by mail and the defendant accepting it by mail, then, when the acceptance was put in the mail at Memphis, the contract was complete and had its inception there. If the proposition came from the defendant and was accepted in the same way in New York, then it would have to be treated as made in New York. In the absence of more proof than we have here it cannot be assumed that this contract was made in Tennessee. Nor is this to be regarded as a Tennessee contract for the reason that it was to be performed there, so that the defendant can claim that its obligations and interpretation is to be governed by Tennessee law. We cannot perceive how any substantial part of the contract was to be performed in Tennessee. The defendant was to collect this draft in Texas, and pay its proceeds, less its compensation, to the plaintiff in New York, and so the contract was to be performed in Texas and New York.

Adams & Leonard collected the draft for the defendant in Texas and sent it their own draft on Jemison & Co. This draft the defendant sent to the First National Bank of New York for collection and credit. If the draft had been paid

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then the defendant would have had credit for the amount with that bank, and would probably have sent its own draft on that bank to the plaintiff for the amount of the collected draft, less its compensation, and that bank would have paid that draft on presentation, and thus the proceeds of the collected draft would finally have reached the plaintiff, and the obligation of the defendant would then, and not until then, have been fully discharged. So, always, the defendant having collected a draft sent to it by the plaintiff and received the proceeds thereof, would, in the ordinary course of business, discharge its obligation to the plaintiff by payment through its corresponding bank in New York. Therefore, we think it is quite clear that this contract cannot in any view be treated as a Tennessee contract, subject in any way to the law of that state.

Our conclusion, therefore, is that the order of the General Term should be reversed and the judgment entered upon the verdict affirmed, with costs.

All concur.

Judgment accordingly.

THE FIRST NATIONAL BANK of Champlain, Respondent, *v.* ORVILLE K. WOOD et al., Appellants.

Where two firms, with one or more common members, have mutual dealings, one of the firms may give its notes for an amount found due from it on settlement of the account to the other or to individual members thereof; and *it seems*, actions at law may be maintained upon said notes without an accounting as between the members of the firm giving the notes.

While individuals who receive gifts of negotiable securities take them subject to all equities existing at the time between the original parties, they are not subject to such as may arise thereafter.

In 1876, upon settlement of accounts between the firm of O. K. W. & Co., which was composed of three members, and the firm of V. A. W. & Co., composed of two members, who were also members of the former firm, a sum was found due the latter firm from the former. In settlement thereof it was agreed that O. K. W. & Co. should give its notes to each of the members of V. A. W. & Co. for one-half of the amount. At their request the note to which each was entitled was made payable to

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his wife. Each received his note and delivered it to his wife as a gift, and it was thereafter retained by her. O. K. W. & Co. paid interest on said notes each year up to 1884, by giving to the holders its notes therefor; in May of that year it became insolvent and made an assignment for the benefit of creditors, preferring the wives to the amount of the original notes and those given for interest. In an action by a judgment creditor of O. K. W. & Co., a portion of whose claim accrued in 1879, to set aside said assignment as fraudulent because of said preferences, *held*, that the action was not maintainable; that the payees named in the notes became absolute owners upon delivery to them, to the same extent as if they had paid value; and that such title and consequent right of recovery were in no way diminished or affected by the subsequent dealings or complications of the two firms.

Phipps v. *Sedgwick* (95 U. S. 3); *Fox* v. *Hanbury* (2 Cowp. 445); *Menagh* v. *Whitwell* (52 N. Y. 146); *Tarbell* v. *West* (86 id. 280), distinguished.

F. N. Bank v. *Wood* (45 Hun, 411), reversed.

(Agued May 6, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 11, 1887, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to set aside an assignment by the firm of O. K. Wood & Co., and an assignment by each of two of the members of said firm, on the ground of certain alleged fraudulent preferences in favor of the wives of said members.

The facts, so far as material, are stated in the opinion.

George H. Beckwith for appellants. The affirmative findings of fact are in conflict with the conclusion of the referee that the notes of O. K. Wood & Co., given by two of the firm to their wives, were fraudulent and void as against the creditors of the firm. (*P. Bank* v. *Stafford*, 89 N. Y. 408.) The preference of the notes to Victor's wife, and of those to the wife and children of Orville, was not illegal, fraudulent or void. (76 N. Y. 630; *Putnam* v. *Hubbell*, 42 id. 106; 88 id. 299; 96 id. 538; *Whiton* v. *Snyder*, 88 id. 305; 80 id. 442; *Coutant* v. *Schuyler*, 1 Paige, 318; *Mattingly* v. *Nye*, 8 Wall. 307; *Horback* v. *Hale*, 112 U. S. 149; *Parish* v. *Stone*, 14 Pick. 198; *Livermore* v. *Northrop*, 44 N. Y. 107.)

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The conclusion of the referee is erroneous and the report and judgment should be reversed, because the respondents have not exhausted their legal remedy. (*McCartney* v. *Bostwick*, 32 N. Y. 53; *Ballou* v. *Jones*, 13 Hun, 629; *Adsit* v. *Butler*, 87 N. Y. 585.)

R. Corbin for respondent. The debts did not express a proper partnership debt at all. (*Richardson* v. *Bank of England*, 4 M. & C. 165; 91 N. Y. 413; *In re Rieser*, 19 Hun, 202; 81 N. Y. 629.) When a firm is indebted to one partner and both the firm and the partner become insolvent at the same time, the creditors of the partner have not a right to share with the creditors of the firm, but the latter must first be paid in full. The creditor-partner, if solvent, could not receive any of the firm assets until its creditors were fully paid, and his creditors can take no greater rights than he had. (*Peckham* v. *Mattison*, 15 Abb. [N. C.] 367; 21 N. Y. 587; Story on Part. § 390; 52 N. Y. 159.) The firm notes under consideration express nothing but an indebtedness existing at the time of their making from the firm to an individual member of the firm. This indebtedness is attempted to be transferred by the individual member to his family as a gift. The firm becomes insolvent, and then attempts to appropriate the assets of the firm to the satisfaction of the gift of the individual member of the firm. (*Menagh* v. *Whitwell*, 52 N. Y. 146; 86 id. 287.) The defense to a creditors' bill that the judgment debtor had property out of which judgment might have been satisfied, is affirmative, and to be set up in answer. Plaintiff must have an opportunity of meeting and controverting. And the non-levy must be result of collusion. (25 N. Y. 430.) When the right to file a creditors' bill once exists by return of execution unsatisfied, it is not taken away by the existence of property of debtor subject to execution. A levy cannot be pleaded in bar to the suit. (6 Paige, 273.) The creditor has a right to resort to the debtor in the first instance, retaining the pledge for any deficiency which he may be unable to collect of his debtor. (7 Abb. [N. S.] 217.)

Opinion of the Court, per PECKHAM, J.

PECKHAM, J. The report of the referee shows that at the time the notes in question were executed by the firm of O. K. Wood & Co., it was solvent, and that it had at such time net assets of the amount of over $65,000, which increased annually up to 1882, when the sum was over $152,000. It further appeared that in 1876 the firm was composed of three members, viz.: Orville K., Victor A. and Albert G. H. Wood, and it had had mutual dealings with a firm called V. A. Wood & Co., which was composed of but two of the three members of O. K. Wood & Co., viz.: Orville K. and Victor A. Wood, and there had been a settlement of such mutual dealings, and after the settlement it appeared that the firm of O. K. Wood & Co. was indebted to the firm of V. A. Wood & Co. in a certain amount then stated, and for one-half this sum it was arranged the firm should give its note to V. A. Wood, and for the other half to O. K. Wood.

In carrying out this agreement the firm, at the request of V. A. Wood, made its note for his one-half of the debt, payable to his wife, and delivered it to V. A. Wood, who accepted it and immediately delivered it to his wife as a gift, who received it and still retains it. Practically the same thing was done with the other half of the indebtedness to O. K. Wood. The firm paid interest on the notes each year up to 1881 by giving its notes therefor. Eight years subsequent to the giving of the original notes and in May, 1884, the firm of O. K. Wood & Co. became insolvent and made an assignment for the benefit of its creditors, in which it preferred as creditors the wives who held the notes above mentioned, to the amount thereof and interest.

In December, 1884, the plaintiff recovered judgment for nearly $8,000 against the firm of O. K. Wood & Co., upon an indebtedness of which the sum of $1,500 accrued December 3, 1879, and the residue subsequent to that date. The plaintiff having issued execution upon its judgment, which was returned unsatisfied, commenced this action to set aside the assignment and for the appointment of a receiver and the payment of its judgment out of the property coming to him.

The evidence is not returned and it is clear from the facts found that the referee based his finding that the assignment was fraudulent and void as against the plaintiff upon the sole fact that this preference was given as above stated.

An accounting had been had between these firms and a settlement reached, and it then appeared that the O. K. Wood & Co. firm owed the other firm the amount named. This is admitted. The notes were given in acknowledgment of such indebtedness. If they had been given directly to the members of the V. A. Wood & Co. firm, that firm could have maintained an action upon them at their maturity against the makers if the notes had not been paid. One partner may give a note upon firm matters to another partner in the same firm, and the holder may maintain an action at law upon it without an accounting. (*Townsend* v. *Goewey*, 19 Wend. 424; *Crater* v. *Bininger*, 45 N. Y. 545; see, also, *Cole* v. *Reynolds*, 18 id. 74.)

Here there was an accounting, and the notes having been given in acknowledgment of the debt then existing and being in the hands of third persons, no question can arise in the law of partnership relating to the so-called anomaly of one person suing himself. But the case of *Cole* v. *Reynolds* (*supra*), shows there is no difficulty even there where the case is that of two firms with one or more common members. The result of the action of the parties was simply a transfer of the firm debt to the respective wives. At this time the firm was solvent. The transaction was, in substance, the same as if the makers had made the notes payable to the two members of the other firm and had thus delivered them to such members, and those members had then indorsed and delivered them to their wives as free and voluntary gifts. If the makers of the notes had thus delivered them to the other partners as payees, the title to the debt, of which the notes were evidence, would have then gone to the payees, and if the payees had transferred the notes by gift and delivery to their wives, the title to that debt would have been also transferred with and followed the notes and would have remained, one-half with each of such wives.

This result is not in the least affected because the transaction took the form of a division of the debt into two parts, evidenced by notes for each half and payable one-half to the wife of V. A. Wood and one-half to the wife and children of O. K. Wood. This was a matter wholly immaterial to the makers of the notes and when, pursuant to the arrangement, they delivered the notes thus made to the two members of the V. A. Wood & Co. firm, they did precisely the same thing as if they had made the notes payable to the order of that firm instead of to the order of their wives. And when V. A. Wood and O. K. Wood transferred the notes thus made to their wives, it was precisely the same as if the notes had been made payable to the firm or to bearer and they had then transferred them. It is true that at the time of the transfer all the equities then existing between the makers of the notes and the two members of the V. A. Wood & Co. firm, accompanied the notes in their transfer by the members of such firm to their wives. In fact there were no equities. The debt was an honest one; it was due, and the firm that owed it was largely solvent and recognized its obligation and gave the notes. It is admitted that the donees might at that time have maintained an action against the makers on the notes and recovered thereon. If so, it could only be upon the ground that they had become the owners of the notes. They became such owners only by virtue of a voluntary gift accompanied by an immediate and unconditional delivery. This, indeed, did give to the donees a perfect title and absolute ownership to and in the notes, as there were then no equities existing between the original parties. (Byles on Bills [7th Am. ed.] 126; *Milnes* v. *Dawson*, 5 Ex. 948.) The notes represented the original debt. How is it then that such ownership, although absolute at the time of the transfer and giving the holders of the notes a right of action, shall nevertheless, if not acted on by collecting the money, be liable at any future time to be changed and, indeed, extinguished by matters subsequently arising between those original parties? I know of no principle which would authorize it.

Upon these facts the defendants had become the absolute

owners of the notes to the same extent they would have been if they had paid value therefor, and I am of the opinion that such title and right of recovery are in no way diminished by the subsequent dealings or complications of those original parties between themselves any more than their title would have been affected thereby had they paid a consideration of dollar for dollar equal to the face of the notes. (Byles, *supra*; *Milnes* v. *Dawson*, *supra*.)

People who receive gifts of negotiable securities, take them subject to all equities then existing between the original parties, but not subject to all which may thereafter, and while they are absolute owners of such securities, exist between those parties. (*Chamberlain* v. *Gorham*, 20 Johns. 144; *Hedges* v. *Sealy*, 9 Barb. 214; *Furniss* v. *Gilchrist*, 1 Sandf. Superior Ct. 53; *Elwell* v. *Dodge*, 33 Barb. 336, 343; 2 Rand. on Com. Paper, § 675; *Baxter* v. *Little*, 6 Met. 7.)

If the parties to whom these notes were delivered by the V. A. Wood & Co. firm had been in no way connected with that firm, and had paid value for the notes, I think they would not have acquired any more of a legal title to them than did the wives of the two parties.

The only difference in their rights upon the notes would lie in the fact that certain defenses, if they existed at the time of the transfer of the notes, might be sufficient for the makers in the case of the wives of the partners, while they would be unavailing in the other case. As no such defenses in fact existed, the title acquired by the wives by reason of the gift was perfect.

The O. K. Wood & Co. firm owed this debt, and it was a firm debt, and it had never been paid. There was, therefore, no reason why it should not be preferred in this assignment.

The case of *Phipps* v. *Sedgwick* (95 U. S. 3), is not in point. It appears in that case that the member of the firm (Mr. Place) had given his obligations to pay what amounted to $90,000 on a house building, and those were his personal obligations, and *at their date* the debt they represented was not a debt of the firm. If he afterwards took the money of

the firm to pay those individual obligations at a time when the business of the firm could not stand it, the court held the transaction must be treated as of the date when the money was so withdrawn, and its honesty tested by the condition of the business at that time.

In this case the debt was in its origin a firm debt, and the firm gave a written obligation to pay it. By a legal transfer the debt has become the property of the wives of the then creditor members of the firm, and they became such owners at a time when there was no defense to the notes as between the original parties to them.

The plaintiff in answer to these views claims that the notes should be treated in the same way as if they represented advances made by the partners to the firm, and he insists that they can be paid only upon an adjustment of the partnership accounts at the time of the dissolution of the partnership, and until then constitute no indebtedness. The truth is the parties made no advances to the firm, and the notes cannot represent a substance which never existed. The makers of the notes owed the two members the sum represented by the notes, and that sum was a proper partnership debt. A partner who simply makes an advance to the firm, relying upon an implied promise of the firm to repay, occupies a totally different attitude from one member of a firm who has had an accounting with the firm, and upon that accounting has been found to be its creditor, and who has then taken from the firm a written promise to pay the debt thus found due him.

In the first case the promise which is implied in favor of the partner who makes the advances is that the firm will repay such sum as may be found due the member upon an accounting, while in the other case the express promise excludes any implication whatever and may be enforced according to its terms. The result is that in some cases the assignee of the debt can subsequently maintain an action thereon, where the assignor, at the time of the commencement of the action, could not. This is not at all inconsistent with the cases which hold the principle that no one deriving under the partner (assignor)

can be in a better position than such partner, that is, a better position than the partner was when he assigned. The case of *Fox* v. *Hanbury* (2 Cowper's Rep. 445), as stated by MANSFIELD, C. J., involved the question whether assignees under a joint commission against two partners, taken out after the bankruptcy of both, could maintain an action of trover against a person in possession of goods under a sale or consignment *bona fide* for a valuable consideration and without any mixture of fraud, from one of the partners who had not then committed any act of bankruptcy himself, but after an act of bankruptcy committed by the other partners. The court held the consignment was good and that the assignees stood exactly in the position of the bankrupts, and they could not come against a *bona fide* consignee of the solvent partner, and, therefore, the firm assignees could not. There is the element in that case of a *bona fide* consignee for value. The only effect of the consideration would, however, be to uphold the transaction, where, if there had been only a gift, it would not have been upheld because of an assignment of property of the firm after an act of bankruptcy by one of its members.

In this case if the members of the V. A. Wood & Co. firm had kept the notes in their own possession without assignment until the O. K. Wood & Co. firm became insolvent, and had then by gift transferred the notes to their wives, the latter would have taken simply the right which their husbands had, and as they could not, at the time of the transfer, have maintained an action upon the notes without an accounting and the preference of other firm debts, it would follow that their voluntary transferees could not. So the question is really reduced to the point as to what was the right of the transferee at the very moment of transfer. If at that time the notes could have been sued upon by the transferrer, that right went to the transferee, and could not, therefore, be altered by subsequent matters between the original parties.

The principle of the case of *Menagh* v. *Whitwill* (52 N. Y. 146), is in no wise antagonistic. The questions there arose upon certain mortgages made by two out of three members of

a firm of their interests in the firm, to secure individual debts, and upon a transfer by the third member of his interest therein to a stranger. It was held that a transfer made, or a lien given, by one member of a firm, transferring or incumbering the *corpus* of the partnership property to pay or secure an individual debt, although made with the consent of the other partners, is void as to the creditors of the firm, unless the firm were then solvent and sufficient property remained to pay the partnership debts.

The case of *Tarbell* v. *West* (86 N. Y. 280) is in principle the same as that just cited from 52 N. Y. (*supra*). Both cases arose under an attempt to transfer or mortgage the individual interest of a member of the firm, and the doctrine was reasserted in the latter case, that a purchaser from one member of a firm of his interest therein acquires only the assignor's share of the surplus after an accounting and adjustment of the partnership affairs, with an exception in regard to real estate under certain circumstances not important to be considered here.

I have found no case which, under the circumstances of the case at bar, prohibits the making of a like promise, or its transfer, or the right of the makers to provide for the payment of the firm debt by a preferential assignment.

The preferences in the individual assignments of O. K. & V. A. Wood of their individual property to pay these notes, may have been invalid. There are scarcely facts enough to enable us to say, and they may be presented in an entirely different manner upon a new trial.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

JOHN OTIS et al., Respondents, *v.* MOSES B. SHANTS, Appellant.

Under a liquidation agreement between a corporation and its creditors, plaintiffs were appointed trustees. In an action upon certain promissory notes given for property purchased by defendant of the trustees after they had assumed the trust, the answer alleged that defendant, as creditor, was induced to become a party to the liquidation agreement by false representations, and asked to have the same set aside and canceled as to him. *Held*, that a demurrer to the answer was properly sustained; that the proper parties were not represented in the litigation to entitle defendant to judgment upon the issue sought to be made by his answer; and that it set up no defense, as fraud inducing the execution of the contract was no answer to defendant's obligation to pay for property purchased of the trustees.

The answer also set up as counter-claims claims arising on certain transactions between the corporation, its officers and agents, and defendant prior to the liquidation agreement. *Held*, that as the alleged claims were not against plaintiffs and had no connection with the cause of action set forth in the complaint, they were not proper matters of counter-claim; and that a demurrer was properly sustained.

Defendant did not ask any affirmative relief upon his counter-claims, but as to each, asked to be permitted to set off sufficient thereof to satisfy plaintiffs' claims; the demurrers thereto were upon the ground "that they were insufficient in law upon the face thereof." *Held*, that the demurrers were sufficiently specific. (Code Civ. Pro. § 494.)

The provisions of the Code of Civil Procedure (§§ 495, 496), requiring that where a demurrer to a counter-claim is on the ground that the cause of action sought to be counter-claimed did not arise out of the contract or transaction set forth in the complaint, or was not connected with the subject of the action, or that the counter-claim does not set forth a cause of action, these objections must be distinctly specified in the demurrer, only apply where defendant demands affirmative relief.

(Argued May 6, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made December 30, 1889, which reversed an interlocutory judgment overruling a demurrer to defendant's answer, sustained said demurrer, and directed judgment for plaintiffs.

This was an action upon two promissory notes given by defendant, for goods sold and delivered to him, to the trustees of

Statement of case.

the Mill River Button Company, who prior to such sales, had become trustees of said company under a liquidation agreement.

Further facts are stated in the opinion.

Myron T. Bly for appellant. The demurrer does not raise the objection that the counter-claims are not of the character specified in section 501 of the Code of Civil Procedure. More particularly, it does not raise the objection that they do not disclose a cause of action arising out of the transaction set forth in the complaint, or connected with the subject of the action. (*Secor* v. *Pendleton*, 47 Hun, 281; *F. F. Ins. Co.* v. *Baldwin*, 37 N. Y. 648; *People ex rel. Lord* v. *Crooks*, 53 id. 648; *Decker* v. *Decker*, 108 id. 128; *Safford* v. *Snedecker*, 67 How. Pr. 264.) The facts stated in the answer are sufficient to constitute a counter-claim. (*Armour* v. *Leslie*, 7 J. & S. 353; *Kreiss* v. *Seligman*, 8 Barb. 440; *Burney* v. *Drexel*, 33 Hun, 419; *Nellis* v. *DeForest*, 16 Barb. 61, 65; *Carter* v. *DeCamp*, 40 Hun, 258; *Swords* v. *N. L. O. Co.*, 17 Abb. [N. C.] 119; *Boyle* v. *City of Brooklyn*, 71 N. Y. 1; *Anderton* v. *Wolf*, 41 Hun, 571; *Hale* v. *O. N. Bank*, 49 N. Y. 626.) It being the spirit and policy of the Code that the rights of all the parties should be adjusted by one judgment, if there is some connection between the defendant's claims and the subject-matter of the action, they are well pleaded. The later cases tend to require but a slight connection, especially as in a case at bar, which appeals strongly to the inherent equity powers of the court, since the corporation is insolvent, and if the defendant's demand is not sustained, he is without remedy. (*M. T. Co.* v. *T. V. Co.*, 7 N. Y. S. R. 90; *Carpenter* v. *M. L. Ins. Co.*, 93 N. Y. 552; *Grange* v. *Gilbert*, 10 Civ. Pro. Rep. 98–105; *Smith* v. *Felton*, 43 N. Y. 419.)

Henry M. Hill for respondents. The question whether the defense or counter-claim set up in the answer is sufficient, is properly raised by the demurrer. (*Collins* v. *Suau*, 7 Robt.

94; *Pittman* v. *Mayor, etc.*, 3 Hun, 370; 62 N. Y. 637; Code Civ Pro. § 494; *Gilbert* v. *Crane*, 12 How. Pr. 455; *Brazil* v. *Isham*e, 12 N. Y. 9; *Manning* v. *Winter*, 7 How. 482; *Goodman* v. *Robb*, 41 id. 605; *Grange* v. *Gilbert*, 10 Civ. Pro. Rep. 98; *A. D. & I. Co.* v. *Staley*, 8 J. & S. 539; *Thompson* v. *Sickles*, 46 Barb. 49.) The right of defense, founded in set-off or counter-claim as against an assignee, is wholly statutory and the allegations in support of it must, in express terms bring such defense within the statute. (*Willover* v. *F. N. Bank*, 10 Civ. Pro. Rep. 80, 87.) The matters alleged in the answer arose, if at all, out of dealings between the defendant and the Mill River Button Company, before the assignment to the plaintiffs. They did not arise out of, nor are they connected with, the claims made by the plaintiffs. (Bishop on Ins. Debt. § 275; *Patton* v. *R. B. P. Co.*, 114 N. Y. 1; *Thompson* v. *Whitmarsh*, 100 id. 35; *Dale* v. *Cooke*, 14 Johns. Ch. 13; *Patterson* v. *Patterson*, 59 N. Y. 577; *Jordan* v. *N. S. & L. Bank*, 74 id. 467.) The counter-claims alleged in the answer, are not proper matters of set-off in this action. (Code, § 501; *McCulloch* v. *Vibbard*, 51 Hun, 227; *Cragin* v. *Lovell*, 88 N. Y. 258; *Vassear* v. *Livingston*, 13 id. 248, 256; *Patterson* v. *Patterson*, 59 id. 574.) The matters alleged as counter-claims in the second and third counts of the answer arose, if at all, out of the tortious acts of the Mill River Button Company or its agents, and would not be proper matters of set-off, even were the company the plaintiff in this action. (Code Civ. Pro. § 501; *Berrien* v. *Mayor, etc.*, 15 Abb. [N. S.] 207; *Wakeman* v. *Everett*, 41 Hun, 278.) The notes given by the defendant being absolute in terms, he is estopped from claiming that they were made subject to any condition, or that they were not to be paid in any event, on the state of facts set up in the answer. (Daniels on Neg. Inst. § 80.)

ANDREWS, J. The plaintiffs do not not sue to enforce any obligation under the "agreement in liquidation." The action is upon notes given for property purchased by the defendant

of the trustees after they had assumed the trust. The first count in the answer alleges that the defendant was induced to become a party to the liquidation agreement by fraudulent representations made by the Mill River Button Company, its agents, officers and directors, and asks for judgment setting aside and canceling as to him the agreement. This answer was not a defense. The agreement was between the corporation, the creditors and the trustees. The proper parties are not represented in this litigation, to entitle the defendant to judgment upon this issue. Neither the corporation nor the other creditors are before the court, and both have an interest and are entitled to be heard on the adjudication of this question. Moreover, fraud in procuring the execution of the agreement by the defendant, would constitute no ground for exempting him from the performance of an independent contract entered into between him and the trustees subsequent to the execution of the agreement in liquidation and founded upon a new consideration. The first answer was clearly insufficient, because admitting its averments the defendant would be entitled to no relief.

The second, third, fourth and fifth answers are founded upon alleged counter-claims. They all set up transactions between the Mill River Button Company, its officers and agents, and the defendant, which took place prior to the execution of the liquidation agreement. The second answer seeks to counter-claim damages alleged to have been sustained by the defendant, arising from the fraud and deceit of the corporation connected with an advance of money made by the defendant to the corporation. The third answer counter-claims damages alleged to have been sustained by the defendant by the fraudulent refusal of the corporation to perform its contract to deliver a portion of its capital stock to the defendant in consideration of money advanced by the defendant. The fourth answer alleges an indebtedness of the corporation to the defendant in the sum of $2,800 for money loaned. The fifth answer alleges a violation by the company of a contract of employment, whereby the defendant sustained damages in

the sum of $3,000. The defendant in his answer does not ask any affirmative judgment on his counter-claims, but as to each he asks simply that he be permitted to set off sufficient thereof to satisfy the claims of the plaintiff.

It is very clear that neither of the answers alleging counter-claims set up any claim that can be set off against the causes of action in the complaint. The alleged counter-claims are not against the plaintiffs. They are founded upon transactions with the corporation, prior to the appointment of the plaintiffs as trustees. The plaintiffs' claims have no connection therewith, and arose subsequent to the execution of the liquidation agreement, upon contracts not tainted with the alleged fraud in the concoction of the agreement. The fact that the defendant was induced to execute the agreement by fraud is no answer to his obligation arising on a purchase from the trustees, nor does it enable him to set off against the debt a claim against the corporation. This would be giving him an inequitable preference.

The plaintiffs demurred to the several answers setting up counter-claims, on the ground "that they were insufficient in law upon the face thereof." Section 494 of the Code of Civil Procedure makes this a ground of demurrer to a counter-claim. But it is claimed that where the defect in an answer alleging a counter-claim is, that the cause of action sought to be counter-claimed, did not arise out of the contract or transaction set forth in the complaint, or was not connected with the subject of the action, or that it does not state facts sufficient to constitute a cause of action, these objections must be specifically taken under section 495, and that they are not raised by a demurrer for insufficiency. That the answers were insufficient as answers of counter-claims, we cannot doubt. They set up no cause of action against the plaintiffs. The claims alleged, if they existed, were wholly irrelevant to the claims sued upon. Assuming that they were statements of good causes of action, they did not exist against the plaintiffs. It is, however, a decisive answer to the defendant's contention that the demurrer should have been drawn under section 495, that that

Statement of case.

section only applies where the defendant demands affirmative judgment on his counter-claim, and has no application where the defendant seeks to use his counter-claim for the purpose simply of extinguishing the claim of the plaintiffs.

We think the judgment of the General Term was right and should, therefore, be affirmed.

All concur.

Judgment affirmed.

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JOHN H. VAN BRUNT et al., Appellants, *v.* THE TOWN OF FLATBUSH et al., Respondents.

While under the provision of the Constitution (art. 3, § 16, Const.), declaring that "no private or local bill * * * shall embrace more than one subject, and that shall be expressed in its title," every provision of such a bill must be germane to and fairly connected with and tending to promote the subject expressed in the title; when the subject is sufficiently expressed all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, may properly be incorporated in the act.

The subject expressed in the title of the act entitled, "An act in relation to local improvements in the town of Flatbush and the acquisition of the rights of a plank-road company in said town" (Chap. 161, Laws of 1889), properly embraces the building and improvement of highways and the construction of sewers, and the act is not made repugnant to said constitutional provision because it contains a provision authorizing the construction of a trunk sewer through the adjoining town of Flatlands, a necessary part of the sewage system provided for in the act.

But *held*, that under said act a sewer could not be constructed in an avenue in the town of Flatlands without the consent of the owners of the soil or the acquisition of the title of such owners in the mode provided by the act; and this, without regard to the question as to whether said avenue is to be treated as a country highway simply or as an urban street; that considered as such a street, as the sewer was in no way for the benefit of the owners of the lands in Flatlands through which it passes, or for the benefit of that town, but belongs to the town of Flatbush and is exclusively for the benefit of its inhabitants, the principles justifying the use of city streets for sewers did not apply.

Van Brunt v. *Town of Flatbush* (59 Hun, 192), reversed.

(Argued May 7, 1891; decided June 2, 1891.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1891, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Treadwell Cleveland and *William V. Rowe* for appellants. Lands taken for public highways are not taken in fee, but an easement or right of passage alone vests in the public, the fee in the land remaining in the adjoining owners. As a consequence, a sewer is an additional burden imposed upon a highway, for which additional compensation must be made to the adjoining owners. (3 Kent's Comm. 432; *B., etc., G. L. Co.* v. *Calkins*, 62 N. Y. 386; *Washington Seminary* v. *P. P. & C. I. R. R. Co.*, 7 Hun, 655; 68 N. Y. 630; *In re Lexington Ave.*, 29 Hun, 303, 305; 92 N. Y. 629; *Milhau* v. *Sharp*, 15 Barb. 209; *Plant* v. *L. I. R. R. Co.*, 10 id. 28; 2 Dillon on Mun. Corp. § 688; *Robert* v. *Sadler*, 104 N. Y. 229; *People* v. *Kerr*, 27 id. 204.) The act (Chap. 161, Laws of 1889), under which alone the defendants can justify their acts, is clearly unconstitutional and void by reason of a violation of section 16 of article III of the Constitution of this state, which provides that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title." (*In re Van Antwerp*, 56 N. Y. 261; *In re Paul*, 94 id. 497; *Johnston* v. *Spicer*, 107 id. 185; *Astor* v. *A., etc., R. Co.*, 113 id. 109; *People* v. *Super, etc.*, 43 id. 10.) The findings of the learned judge at Special Term in respect to the burdens to which the plaintiffs' ownership of the fee in the highway may be subjected are wholly irreconcilable, and the appellants are, therefore, entitled to treat as controlling the finding most favorable to them. (*Redfield* v. *Redfield*, 110 N. Y. 671; *Wahl* v. *Barnum*, 116 id. 99.)

William J. Gaynor for respondents. The legislature itself recognized the urban character of this territory by negatively providing that the right to lay a sewer in any public street need not be acquired by eminent domain. (*Crooke* v. *F. W. Co.*, 29 Hun, 245; *Conklin* v. *O. & W. R. Co.*, 102 N. Y. 107.) The claim that the statute in question is void in that it is violative of the constitutional provision that "no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title," is untenable. (Const. of N. Y. art. III, § 16; *Ins. Co.* v. *City of New York*, 8 N. Y. 241; *Brewster* v. *City of Syracuse*, 19 id. 116; *People ex rel.* v. *Banks*, 67 id. 568–572; *People ex rel.* v. *Briggs*, 50 id. 553–562; *In re Mayer*, Id. 504; *In re Cameron*, Id. 502; *People ex rel.* v. *Dudley*, 58 id. 323; *In re Village of Middletown*, 82 id. 196; *In re Orphan Home*, 92 id. 116; *Commissioners* v. *Dwight*, 101 id. 9; *In re Knaust*, Id. 188–194; *Cole* v. *State*, 102 id. 48–58; *Astor* v. *Arcade R. Co.*, 113 id. 93, 109, 110; 89 id. 396; Laws of 1888, chap. 312.)

EARL, J. The plaintiffs are owners of certain lands in the town of Flatlands, through which Flatbush avenue runs, and they own the fee in the avenue, subject to the public easements. The individual defendants are the street and sewer commisioners, appointed and acting under the act, chapter 161 of the Laws of 1889. They were proceeding to construct a sewer through the avenue, and the plaintiffs commenced this action to restrain them on the ground that they had no right to construct the same through their land in the avenue without their consent and without condemning their land in the avenue under the provisions of the act, and also on the ground that the act is unconstitutional in that the title thereof is insufficient, under section 16 of article 3 of the Constitution, which provides that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title."

The title of the act is "An act in relation to public improve-

ments in the town of Flatbush and the acquisition of the rights of a plank-road company in said town." Section 1 provides for the appointment of the five commissioners who are required to be citizens, residents and freeholders of the town. Section 2 provides for the purchase of rights, franchises and property within the town of Flatbush of the plank-road company, and authorizes them to change the lines of the avenue within the town, and to acquire lands for that purpose, and to fix a line on each side of the avenue as a court-yard line. It authorizes any person owning the adjacent property to use the portion of the avenue in the court-yard in front of his property as follows: By enclosing the same with open and ornamental fences, and by building open porches or stoops and having flowers and ornamental shrubbery and ornamental structures; and the commissioners are authorized to improve the avenue by grading, curbing, guttering, flagging and paving or macadamizing the same, to fix the width of the carriage-way and sidewalk and to plant ornamental trees thereon. Section 4 is as follows: "Such commissioners shall devise and make a plan for building one or more trunk sewers to take and discharge the sewage matter in such town into the tide-water. And for the purpose of building sewers in such town to connect with the trunk sewer or sewers, they may divide the territory in said town into as many districts as they may see fit, and devise a plan for the building of sewers in the streets of each district, so as to connect with such trunk sewer or sewers; they shall make and file maps showing such plans. All sewers herein provided for, other than trunk sewers, and other than sewers built for surface drainage only, are to be designated on any map or plan which may be filed, as herein provided, and are for the purposes of this act, designated as 'lateral sewers.'" And in section 5 it is provided as follows: "And for the purpose of building such trunk and lateral sewers, they shall have the right to enter into or upon any street required for such sewers, and there to build and maintain the same. The right hereby given shall be deemed to include the right to acquire the necessary lands and rights to build the trunk and lateral

sewers and branches in the said town of Flatbush, and also to build so much of said trunk sewer as may be necessary in the town of Flatlands. In case they require any rights in any streets or other lands not belonging to the public, for the purpose of doing what is herein authorized as to said sewers, or for improving Flatbush avenue as hereinbefore provided, they may acquire such rights and property by purchase or by the proceedings and in the manner provided as to the acquisition of lands for the purposes of railways."

All the acts of the commissioners are to be performed in the town of Flatbush except the construction of the trunk sewer through the town of Flatlands to tide-water, and the plaintiffs claim that the construction of the sewer in the town of Flatlands is not expressed in the title.

The section of the Constitution invoked by the plaintiffs to destroy this act has given the courts much trouble. They have been able to formulate no general rule that will solve all the cases coming under this section. Whether the title of an act will stand the test of this constitutional requirement depends generally upon the peculiar provisions of the act. Every provision contained in a private or local bill must be germane to and fairly connected with and tending to promote the subject expressed in the title. As said in *Astor* v. *Arcade Railway Company* (113 N. Y. 93), "when the subject is expressed, all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act, and are germane to the title." The subject expressed in the title, "local improvements in the town of Flatbush," clearly embraces the building and improvement of highways and the construction of sewers. Sewers cannot be constructed in that town without an outlet, and the sewerage system would be imperfect and useless unless the sewage can be carried to some point where it can be discharged. Hence the act authorizes the construction of the trunk sewer through the town of Flatlands to tide-water. We may assume from the provisions of the act, and from the names of the two towns that the most convenient, if not the

only practical way to dispose of the sewage is to conduct it to tide-water. The trunk sewer through Flatlands is in no way for the benefit of that town, nor in any proper sense a local improvement in that town. It is a necessary part of the sewerage system of Flatbush to be built and maintained by that town, and at its expense. The trunk sewer through Flatlands is such a necessary part of the sewerage system of Flatbush that it is in every sense germane to the subject expressed in the title of the act. The improvement is in Flatbush, and this trunk sewer is a necessary part of the improvement. The case of *The People ex rel.* v. *Briggs* (50 N. Y. 553), furnishes some authority for the conclusion we have reached on this branch of the case. We, therefore, see no reason to condemn the act on constitutional grounds.

But we are of the opinion that the sewer cannot be constructed in Flatbush avenue in the town of Flatlands, without the consent of the owners of the soil, or, in the absence of such consent, without the acquisition of the title of such owners in the mode provided in the act. The act contemplates that the commissioners may require rights in streets not belonging to the public, and provides for the condemnation of such rights.

In the ordinary country highways of the state, the public simply have an easement in the soil for traveling, and the maintenance of the highways for that purpose, and the soil in such highways cannot ordinarily be subjected to any other burden or easement without acquiring the right or consent of the owners of the soil. (*Bloomfield Gas Light Co.* v. *Calkins*, 62 N. Y. 386; 2 Dillon's Municipal Corporations, §§ 688 *et seq.*) It is not necessary now to determine under what circumstances, if ever, the land in such highways can be subjected to other burdens or easements than those growing out of, or connected with, the necessities of public travel. The public easements, however, in the streets of cities and villages are more extensive. In urban streets, the public convenience and health and the general welfare require that the soil thereof should be subjected to greater burdens. They may be used

for the laying of water and gas-pipes and the construction of sewers, and some other purposes. The public generally have an interest in and are benefited by such improvements, and they are necessities of modern life.

It is alleged in the complaint in this action that Flatbush avenue in the town of Flatlands "is a country road or highway extending through a rural district; that all of the lands abutting thereon consist exclusively of farms and farming lands; that said lands and said town of Flatlands are sparsely settled, and that said lands are chiefly vacant lands used only for farming purposes," and this was upon the trial admitted to be true. By statements made upon the trial, which seem to have been taken as evidence, it appeared that from the southerly line of the town of Flatbush, for a distance of more than a mile to the village of Flatlands, there were along the avenue but twenty dwelling-houses, mostly upon farms. Upon this evidence and other facts placed before the trial judge, he found, in substance, that Flatbush avenue was an urban street, and not a mere country highway, and that the sewers could be built therein without the consent of the owners of the soil, and without compensation to them. We do not think it important now to determine upon the facts as they appear, whether this avenue should be treated as an urban street, with all the public easements therein appertaining to such a street, or whether it should be treated as a country highway, with easements only for public travel, because the result must be the same in either event.

If the legislature had authorized a system of sewerage in the town of Flatlands for the convenience, health and welfare of the inhabitants of that town, and this sewer had been projected with lateral sewers, with the privilege of the owners of adjacent lots to connect their lots therewith, then we are inclined to believe, for reasons we need not now state, that the character of the avenue and of the locality was such and the population is such that the sewer could be built in the avenue without the consent of the fee owners and without compensation to them. The immediate benefits and advan-

tages which they in common with the whole community might receive might be all the compensation to which they would be entitled. But, as above stated, this sewer in Flatlands is in no way for the benefit of the owners of the lands through which it is built, or for the benefit of the community in which they live. Such owners have no right to connect their lots with the sewer and can in no way use the same. The sewer belongs exclusively to the town of Flatbush, and is solely for the benefit of the inhabitants thereof. Under such circumstances what right have the commissioners to enter upon the lands of the plaintiffs and dig up their soil and place sewers therein without their consent and without compensation to them? We can perceive none, and we know of no principle of law and no authority which can justify them. Suppose, instead of running this trunk sewer south it had been projected northerly through the populous city of Brooklyn to tide-water in the bay of New York, and suppose the lot owners upon the streets through which it was to run owned the fee of the lands in the street, will it be claimed that it could be thus constructed for the sole benefit of Flatbush — in no way for the benefit of the city of Brooklyn, the lot owners having no right whatever to use the sewer and having no benefit therefrom, for the sole purpose of discharging the sewage of Flatbush into the ocean, without the consent of the fee owners or any compensation to them? In such a case the principles which justify the use of urban streets for sewers would have no application.

We are, therefore, of opinion that the judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

JULIUS LIPMAN et al., Respondents, *v.* THE JACKSON ARCHITECTURAL IRON WORKS, Impleaded, etc., Appellant.

In an action for the foreclosure of a mortgage it appeared that $55,000, the amount to secure which the mortgage was given, was by its terms to be advanced to the mortgagors in seventeen specific installments, dependent upon different stages of the work of constructing a building upon the mortgaged premises, which was to be the chief security for the loan. When the advances amounted to about $40,000 a lien for materials furnished and services performed was filed. The mortgagees thereupon declined to make any further advances, and a contract was then entered into by which the lienor agreed to subordinate its lien to the further advances called for by the mortgage, and the mortgagees agreed to pay said lien in specified proportions out of the fifteenth and sixteenth installments when they should be earned and become due, and they accepted an order upon them payable out of said installments when due. The mortgagors never earned or became entitled to these installments, but the mortgagees advanced to them the amount secured by the mortgage, and $10,000 more, less the amount of the lienor's claim, to be used in the prosecution of the work, under an agreement with said lienor that the claim should be paid out of said $10,000. The lienor was made defendant, but no personal judgment asked against it; it set up its claim as a counter-claim and asked for a money judgment. The counter-claim was dismissed. A judgment of foreclosure and sale was ordered for the amount of the mortgage and interest, and the surplus ordered to be brought into court. *Held*, no error; that the judgment was in accordance with and awarded only the relief agreed upon by the parties; that whatever claim said lienor might have it was not a permissable counter-claim (Code Civ. Pro. § 501.)

Also *held*, that plaintiff's objection to the counter-claim was not waived by the omission to demur or specifically object thereto by answer; that the provisions of the Code of Civil Procedure providing for such a waiver (§§ 498, 499), relate only to defects in the complaint and a waiver by the defendant.

(Argued May 7, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made February 2, 1891, which affirmed a judgment in favor of plaintiffs, entered upon the report of a referee.

Statement of case.

This was an action for the foreclosure of a mortgage executed by the defendants, William A. Mathesius and Isabella C. Anderson, to plaintiffs to secure the payment of $55,000, which was to be advanced from time to time as the buildings upon the mortgaged premises approached completion.

The defendant, The Jackson Architectural Iron Works, under contract with said mortgagors, performed work upon and furnished materials for said buildings, and not being paid, filed a mechanic's lien upon the premises.

The facts are sufficiently stated in the opinion.

Henry R. Beekman for appellant. The order drawn by Mathesius and Anderson on the plaintiffs, and accepted in writing by them constituted in law an assignment *pro tanto* of the moneys which were to become payable to Mathesius and Anderson on account of the advances yet to be made to them by the plaintiffs under their contract and secured by said mortgage for $55,000; and the Jackson Architectural Iron Works, upon receiving such order, so accepted, thereupon became entitled as assignee to so much of the moneys, thereafter to be advanced on the bond aud mortgage in suit, as would be equivalent to the amount of the order and interest. (*Brill* v. *Tuttle*, 81 N. Y. 454; *Risley* v. *Smith*, 64 id. 567; *Risley* v. *Indianapolis, B. & W. R. R. Co.*, 62 id. 240; *Gallagher* v. *Nichols*, 60 id. 438; *Lowery* v. *Steward*, 25 id. 239.) The plaintiffs, in advancing to Mathesius and Anderson the whole of the amount secured by the $55,000 mortgage, violated the duty they owed to the Jackson Architectural Iron Works, to retain the portion of the loan affected by the equitable assignment in its favor by virtue of said accepted order. (*Gibson* v. *Lenane*, 94 N. Y. 183.) The plaintiffs, by voluntarily paying to the defendants Mathesius and Anderson the whole of the loan of $55,000, waived the conditions of the building loan contract, which provided that the fifteenth and sixteenth installments of the loan should become payable only when certain specified work had been done on the building. (*Risley* v. *Smith*, 64 N. Y. 576.) The right of the defendant to interpose a counter-

claim based upon the accepted order cannot now be questioned. (*Bathgate* v. *Haskin*, 59 N. Y. 533; *Hunt* v. *Chapman*, 51 id. 555.)

E. A. Jacob for respondents. The doctrine of equitable assignment does not entitle appellant to payment of the orders. (*Brill* v. *Tuttle*, 81 N. Y. 454.) The counter-claim of appellant was properly dismissed. (Code Civ. Pro. § 501; *N. F. Ins. Co.* v. *McKay*, 21 N. Y. 191.)

FINCH, J. We need not consider the question whether the contracts between the parties destroyed the effect of the mechanic's lien filed by the creditor company, or merely subordinated that lien to the plaintiffs' further advances and preserved to the lienor a right to participate in a surplus resulting from the sale, because in either event we are required to affirm the judgment. The lienor has been defeated upon the ground that, as against the mortgagees, its debt is not yet due and payable, since the express condition upon which payment was promised has not been fulfilled. The contract of the mortgagees with the owners was to make the advances in specific installments, dependent upon different stages of work done in the construction of the building. That building was to be the main and chief security for their loan, and it was necessary to their safety that the advances in general should not outrun the progress of the work, but should keep always behind it, in order that there might be existing value mortgaged at each added installment of the loan. Two of these installments were numbered the fifteenth and sixteenth. By the terms of the former, the sum of six thousand dollars was to be advanced "when the plumbing work is nearly completed, all doors hung, elevators and steam apparatus nearly completed, and all sashes in." By the terms of the latter, five thousand dollars was to be advanced "when railings and balusters completed, hardware all in, glazier's work completed, front area work done, sidewalks and yards laid and cellars concreted." The whole advances originally contemplated amounted to fifty-five thou-

sand dollars. Before the fifteenth and sixteenth installments had been earned, and when the advances amounted to about forty thousand dollars, the appellants filed their lien. In presence of that emergency, the advances stopped, and the mortgagees declined to continue them until some arrangement of the incumbrance was made. The three parties thereupon executed the first contract. Under its provisions the mortgagees were made safe by the agreement of the lienors to subordinate their lien to the further advances to be made under the protection of the mortgage; and the lienors were provided for by the mortgagees' promise to pay the amount of the lien when the fifteenth and sixteenth installments should be earned by the builders and become due to them. This last arrangement took the form of an order drawn by the builders upon the mortgagees directing them to pay "out of the moneys growing due to us," eight hundred dollars "out of the fifteenth installment, payable according to the terms of said contract," and two thousand and seventy-nine dollars "out of the sixteenth installment," and which was accepted by the mortgagees, "payable as above." Their promise, therefore, was explicitly conditioned upon the earning of the two installments by the builders, which could only be done in accordance with the specified requirements.

Now, that work has never yet been done. The builders have not earned the fifteenth and sixteenth installments, or become entitled to receive the sums for which they provided. If nothing else had happened, it would follow inevitably that the fund, out of which the lienors were to be paid, as a fund due and payable to their debtors, never in fact accrued or came into existence; and since the lienors, in making their lien subordinate, had accepted the promise of the mortgagees to pay only when the two installments became due according to the terms of the building contract, the latter were bound to pay only when those terms were fulfilled.

But something else *did* happen. The mortgagees advanced to the builders not only the full fifty-five thousand dollars, but some part of ten thousand dollars more, and yet with all that

assistance the latter never carried the building to the stage of completion which made due and payable the fifteenth and sixteenth installments. But the lienors claim that those installments, having been paid to the builders, must be deemed to have become due and payable, and that the prior completion of the work represented by those installments was waived by the mortgagees. There is some force in that contention, and if it should turn out that the mortgagees never advanced of the final ten thousand dollars the full amount less the lienor's claim as was agreed, it might with even more force be argued that if such advances had been made, the work in arrears would have been performed, and that the mortgagees could not stop their promised aid and resort to a foreclosure so as to prevent the completion of the work and yet rely on that failure of completion to avoid performance of their promise.

But, while they may be liable on their acceptance, and we do not determine that question either way, I am convinced that the remedy of the lienor is not in this action, and that the judgment rendered was right. It orders a foreclosure, cuts off the lien of the creditor, gives to the mortgagees a preference of payment from the proceeds to the full amount of the fifty-five thousand dollars and interest, and orders any surplus arising on the sale to be brought into court. To all that the lienors explicitly agreed, for they consented that their lien should be subordinated to that of both mortgages, and that the whole fifty-five thousand dollars should be advanced under the shelter of that consent. Beyond that, they consented to the further advance of ten thousand dollars, less the amount of their claim, to be used for some of the very purposes covered by the fifteenth and sixteenth installments of the building contract, for these also respected the plumber's work and trim of the building. So far, the appellants cannot successfully question the judgment, for it is in exact accord with the contracts and awards only the relief which it agreed should be given. It is the mortgage for fifty-five thousand dollars and that alone which is being foreclosed, and against that the appellant has no lien and no defense. Whatever may prove to be

its rights in the proceeds of sale, they must necessarily exist only against a possible surplus, and nothing in the judgment cuts off any such rights or bars the appellant from an application to share in its distribution.

It is true that the counter-claim pleaded was dismissed, but that result was necessary because, whatever its merits, it was not a permissible counter-claim in the action for foreclosure. It set up a legal cause of action on the acceptance and against the acceptors as such, and asked a money judgment against them. Assuming, which we do not decide, that the plaintiffs were thus liable on their acceptance, the debt was not the subject of a counter-claim in the equity action. The plaintiffs demanded no personal judgment against the appellant, and so the claim of the latter could in no manner lessen or limit or cut down the relief which the plaintiffs sought and to which they were clearly entitled. The Code of Civil Procedure requires that the counter-claim must tend in some way to diminish or defeat the plaintiff's recovery (§ 501), and enacts in this respect the doctrine of *National Fire Ins. Co.* v. *McKay* (21 N. Y. 191). The defendant's plea has and can have no such effect. Its alleged lien as a lien was subordinate to that of the plaintiffs, and its debt as a debt could not diminish or defeat the plaintiffs' relief upon their cause of action. The lien was no defense and the debt no counter-claim. Proof of the latter could only result in an independent judgment for money, having no effect whatever upon the foreclosure. The application of the doctrine is well illustrated in *Hunt* v. *Chapman* (51 N. Y. 555). In that case the counter-claim was allowed, but because the plaintiff asked a judgment upon the bond for a deficiency against the defendant asserting the counter-claim, and the claim of the latter became simply contract against contract, and if allowed would defeat or diminish the plaintiffs' recovery. Here, no personal judgment is sought against the appellant and there is nothing upon which its claim can be applied, or which it can possibly affect.

It is said that plaintiffs, not having demurred to the counter-claim or specifically objected to it by answer, have waived the

objection. The section of the Code providing for such waiver relates only to defects in the complaint and a waiver by the defendant. (§§ 498, 499.) The appellants requested a finding of law awarding judgment on the counter-claim, which the referee refused. The respondents may defend that refusal upon the ground asserted, as well as that upon which the referee seems to have acted.

For these reasons, the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

BLAKE AND JOHNSON, Respondents, *v.* STEPHEN R. KROM, Appellant.

In determining as to whether the amount in controversy in an action is less than the sum limited for an appeal to this court, the evidence as well as the pleadings may be resorted to.

Where, in an action on two promissory notes, the making and execution thereof was admitted by the answer, which set up two counter-claims, and it appeared by the evidence that the amount to which defendant was entitled in any event upon one of the counter-claims, including the amount claimed upon the other, was less than $500, *held*, that the judgment was not reviewable here; also, that as defendant in the other counter-claim claimed a liability on contract fixed at a certain sum, and did not move to amend or increase the claim, he could not be heard upon appeal here to claim that his demand was larger than that stated.

One of the counter-claims was for damages for an alleged breach of a contract upon the part of plaintiff not to manufacture certain machines from defendant's patterns, except for him or upon his order. *Held*, that the damages to which defendant was entitled, assuming a breach of the contract was shown, were simply the profits he would have received had the sale been by him; that he could not include royalties or other incidental advantages; and that as the damages were unliquidated it would not carry interest upon a recovery.

(Argued May 7, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made

Opinion *per Curiam*.

January 5, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are set forth in the opinion.

Herbert T. Ketcham for appellant. Cotemporaneous wrongdoing is material and valuable evidence of the particular wrong charged. (*Cary* v. *Hotaling*, 1 Hill, 311; *Bottomly* v. *United States*, 1 Story, 135.) The counter-claim is not barred by the Statute of Limitations. (Code Civ. Pro. § 390; *Olcott* v. *T. R. R. Co.*, 20 N. Y. 210; *Rathbun* v. *N. C. R. Co.*, 50 id. 656.) This court has jurisdiction of the counter-claim. (U. S. Stat. at Large, chap. 7, § 629; *Annin* v. *Wren*, 44 Hun, 322; *D. T. M. Co.* v. *Hyatt*, 125 U. S. 42.)

Michael H. Cardozo for respondents. The judgment is not appealable. (Code Civ. Pro. § 191, subd. 3; *Van Gelder* v. *Van Gelder*, 81 N. Y. 128; *Josuez* v. *Conner*, 75 id. 156; *Knapp* v. *Deyo*, 108 id. 518; *Campbell* v. *Mandeville*, 110 id. 628.) The trial court properly directed a verdict for the plaintiff. (*Dwight* v. *G. L. Ins. Co.*, 103 N. Y. 341.) There was an account stated between the parties which was conclusive upon the defendant. (*Lockwood* v. *Thorne*, 11 N. Y. 170; *Knickerbocker* v. *Gould*, 115 id. 533.) The court properly directed a verdict for the plaintiff. (*Meagley* v. *Hoyt*, 26 N. E. Rep. 719; *C. T. L. Co.* v. *K. C. V. Co.*, 43 Fed. Rep. 7.) The state court had no jurisdiction of this counter-claim. (*H. S. M. Co.* v. *Reinoehl*, 102 N. Y. 167.)

Per Curiam. The action was brought upon certain promissory notes of the defendant and the indebtedness thus evidenced is admitted. But the defendant interposed two counter-claims, one for the sum of $82.42 for percentages or commissions upon the manufacture of parts of machines, and the other for $\$1{,}471\frac{17}{100}$ damages for the violation by plaintiffs of their agreement not to manufacture certain machines from defend-

Opinion *per Curiam.*

ant's patterns, except for him or upon his order. The evidence is very slight upon which to charge the plaintiffs with any liability or with a violation of their agreement. Whether the trial court was right in refusing to submit the case to the jury and in directing the verdict for the plaintiffs is a question, however, which we shall not review. The amount in controversy, arising out of these counter-claims, falls below the sum of $500. This appears from the evidence and we have the right to refer to it, as well as the pleadings, in order to ascertain that fact. Assuming that the plaintiffs made another machine, which was not ordered by defendant and did not pass through his hands, what he lost thereby was the profit which would have been his upon a sale by him. That profit, according to his proofs, would have been $323.33 and that represents the extent of the damage recoverable. He cannot claim to include the royalties, or other incidental advantages, accruing to him from a sale of his patented machine. Such a claim would remain his as against the parties who purchased from the manufacturers. All that plaintiff could have damaged him by selling the machine directly to others, upon the evidence, would be in the amount of the profit, which he could have derived from the sale of the machine, had it passed through his hands. The amount of damages thus established under this counter-claim, added to the previous counter-claim, would not amount to $500, even if to the first counter-claim there be added interest upon it, which is not demanded. The second counter-claim being for unliquidated damages, would not carry interest upon a recovery. As the defendant claimed, under his first counter-claim, a liability to him from the plaintiffs, fixed at a certain sum under the contract, and did not move to amend or to increase the claim, he cannot be heard upon this appeal to claim that his demand was larger than stated in the pleading.

The appeal should be dismissed, with costs to the respondent.

All concur.

Appeal dismissed.

Statement of case.

EDWARD SCHELL *v.* THE MAYOR, ETC., OF NEW YORK.

In the Matter of the Application of ROBERT SCHELL for an Order Requiring PETER A. HARGOUS, an Attorney, to Pay Over Moneys Collected in the Above-entitled Action.

While *it seems*, a proceeding on the part of a client, or his assignee, to compel his attorney to pay over money received by him for the client, may be entertained, and the court may direct payment of the money or punish the attorney by fine or imprisonment, this is not a matter of absolute legal right, but simply one of discretion, and an order refusing to grant the relief sought, which does not show that it was made because of want of jurisdiction, is not reviewable here.

Reported below, 58 Hun, 440.

(Argued May 7, 1891; decided June 2, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 29, 1890, which reversed an order of the Special Term and denied the application of the petitioner.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

John Delahunty for appellant. In this case Mr. Hargous acted solely as an officer of the court and the remedy invoked is proper. (*In re Paschal*, 10 Wall. 491; *In re Aitkin*, 4 B. & A. 47; *U. S.* v. *Anon*, 21 Fed. Rep. 471; *B. G. S. Bank* v. *Tood*, 52 N. Y. 489; *Foster* v. *Townsend*, 2 Abb. Pr. 243; 87 N. Y. 524.) Even if the petitioner originally had no right to institute this proceeding, the respondent, by his stipulation, has waived his right to raise that objection; the rights of the parties were fixed by the stipulation they saw fit to enter into, and the order reversed by the General Term is expressly founded on that stipulation. Parties may by stipulation waive statutory and constitutional rights. (*In re N. Y. & L. R. R. Co.*, 98 N. Y. 447.)

Moody B. Smith for respondent. This proceeding can only be brought for misconduct, for a tort or wrong, and is in

the nature of a contempt. (*In re Knapp*, 85 N. Y. 284; *Hudson* v. *Terrall*, 2 Dowl. Pr. 264; *In re Aitkin*, 4 B. & Ald. 47; *In re Cardross*, 7 Dowl. Pr. 861; *In re Paschal*, 10 Wall. 483; *Batsbury* v. *Frazer*, 19 Penn. St. 95.) There is no reason for the assumption that in assigning a debt one can assign a summary proceeding to collect that debt, not on account of the debt, but for misconduct. (*Fairchild* v. *Sargent*, 104 N. Y. 115.)

O'BRIEN, J. The petitioner is the assignee of Robert Schell who recovered a judgment against the mayor, etc., of the city of New York on the 25th of July, 1885, for $5,507.16. He states in his petition that the whole amount of this judgment was paid over in the month of August, 1885, by the defendant in the action, to Peter A. Hargous, the attorney for the plaintiff and who prosecuted the claim. It appears that the attorney was to receive and retain, as compensation for his services in the action, a certain percentage of the recovery. The petitioner admits that the sum was to be twenty-five per cent and the attorney claims that, by the agreement, he was to have more, though no claim, beyond twenty-five per cent, seems to have been made by him till after these proceedings were instituted. The court at Special Term made an order, upon the petitioner's application, directing the attorney to pay to the petitioner the sum of $3,251.31, that being the amount found due, or in default of such payment, within five days, that a commitment issue against him. The General Term has reversed this order and denied the application and the petitioner appeals to this court from the order of reversal. The usual and ordinary remedy of a party, for the enforcement of a claim against another, is an action in a court of law or equity but, as between attorney and client, it has long been settled that a proceeding of this character, to compel the attorney to pay over money received by him and which belongs to the client, may be entertained and is within the power of the court. The principle upon which this exceptional remedy in such cases is based, is the power which the court has over its own

officers to prevent them from, or punish them for, commiting acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. In such cases the court, in vindication of its own dignity or for the relief of the client when clearly wronged, may entertain summary proceedings by attachment against any of its officers, and may, in its discretion, direct the payment of money or punish them by fine or imprisonment. When an application is made to the court for the exercise of its powers to compel an attorney to pay over money received for and belonging to the client, the ground of the jurisdiction is the misconduct of its own officer. It has been said that this power should always be exercised with great prudence and caution and a sedulous regard for the rights of the client on the one hand and of the attorney on the other. It is not an absolute right that the client has to invoke this severe and summary remedy against the attorney, but one always subject to discretion. It is for the court to say when and under what circumstances it will entertain such proceedings, against its officers, upon the application of the client, and a refusal to proceed in that way is not the denial of any legal right. (*Bowling Green Savings Bank* v. *Todd*, 52 N. Y. 489; *In the Matter of Knapp*, 85 id. 284; *In the Matter of H——, an Attorney*, 87 id. 521; *In re Paschal*, 10 Wallace, 483.)

It does not appear, from the order appealed from, that the application was refused for want of power to grant it, and we must, therefore, assume that it was denied for the reason that the court, in the exercise of its discretion, did not consider the case under all the facts and circumstances, a proper one for the exercise of the extraordinary jurisdiction invoked. If we were permitted to look into the opinion of the General Term for the ground of reversal and denial of the relief, it would appear that the court was of the opinion that an assignee of the client was not entitled to this remedy. While it would, we think, be difficult to show that the Supreme Court has not the power to entertain the proceedings, even upon the application of an assignee, it certainly could, in the exercise of its

Statement of case.

discretion, decline to use it, and that may have been the ground of the decision appealed from. The order of the General Term was, therefore, one resting in discretion, and we have no power to review it.

The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

In the Matter of the Application for Ancillary Letters of Administration upon the Goods, Chattels and Credits of JAMES D. PROUT, Deceased.

Under the provision of the Code of Civil Procedure (§ 2699), declaring that "before ancillary letters of administration are issued, the person to whom they are awarded must qualify in the manner prescribed for the qualification of an administrator upon the estate of an intestate, except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of this state," the power of the surrogate is not limited to requiring a bond not exceeding twice the amount appearing to be due to residents.

Said provision was intended to give the surrogate a discretion to modify the general rule (§ 2667), which requires a bond in a penalty not less than twice the value of the personal property and to accept one less in amount if, by reason of adequate security having been already given, additional security for the protection of the general interests is not in his judgment required, or where the next of kin have consented to waive security, and in the case of domestic creditors, where their protection was the only interest involved, to prescribe a limit beyond which security should not be exacted.

Where, therefore, adequate security to protect the general interests had not been given, and other interests aside from those of domestic creditors were involved, *held*, that the surrogate had power to require as a condition of granting ancillary letters, a bond in the penalty of double the value of the personalty in this state.

(Argued May 7, 1891; decided June 2, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 18, 1890, which affirmed an order of the surrogate of Kings county denying the petitioner's application.

Opinion of the Court, per ANDREWS, J.

The nature of the proceedings and the facts, so far as material, are stated in the opinion.

William J. Groo for appellant. On granting ancillary letters of administration, the surrogate cannot require a bond exceeding twice the amount which appears to be due creditors in this state. (Code Civ. Pro. §§ 2667, 2698, 2699; *In re Musgrave*, 5 Dem. 429; *Moyer* v. *Weil*, 1 id. 71; *Evans* v. *Schoonmaker*, 2 id. 249; *In re McEvoy*, 3 Law Bull. 31; *Lynes* v. *Coley*, 1 Redf. 405; 14 Abb. Pr. 461.)

G. H. Crawford for respondent. The granting of secondary or ancillary letters of administration is a well established feature of English probate practice. (1 Williams on Ex. 361, 362; 2 R. S. chap. 6, art. 2, §§ 31, 42.) The change to the law as it stands expressed in section 2699 of the Code of Civil Procedure, was made, without doubt, to obviate the hardship of compelling an administrator who had already given ample security in the domicile of the deceased to furnish additional security here, and section 2699 is to be construed with due regard to this fact. (*Hart* v. *Cleis*, 8 Johns. 44.) The surrogate had the right, in the exercise of a sound discretion, to make the order appealed from. (Code Civ. Pro. § 2699.) Upon this appeal, the infant child of James D. Prout should have been brought before the court, because he is most certainly a party interested in the subject-matter of the order appealed from. (Code Civ. Pro. § 2573.) The rule that personal property follows the domicile of the owner, made the securities of decedent, which were in Brooklyn, just as much a part of his estate as if they had been in New Jersey. (*Cutler* v. *Wright*, 22 N. Y. 474; Code Civ. Pro. § 2667; *Monroe* v. *Douglass*, 5 N. Y. 447; *Savage* v. *O'Neil*, 45 id. 298.)

ANDREWS, J. The question turns upon the power of the surrogate to require an administrator's bond in double of the value of the personal estate, in this state, of James D. Prout, who at the time of his death was a resident of New Jersey,

Opinion of the Court, per ANDREWS, J.

as a condition to the grant of ancillary administration. The personal estate of the decedent at the time of his death, consisted of personal effects of the value of about $2,500, in New Jersey, and of stocks and securities of about the value of $40,000, deposited with a safe deposit company in the city of Brooklyn. On the 1st day of August, 1889, letters of administration were issued by the Probate Court of New Jersey to the widow of the decedent upon her petition setting forth that the personal estate of the decedent in that state did not exceed the sum of $2,500. The administratrix on the granting of the letters, executed her bond with sureties in the penal sum of $5,000, to the surrogate of Monmouth county, New Jersey, where the decedent resided, conditioned to account for the personal estate of the intestate "in the state of New Jersey," which has or shall come to her hands. The petitioner did not disclose in her petition the fact that there was any other personal estate of the decedent beyond what was in his actual possession in that state at his decease.

On the 1st day of April, 1890, the widow, who with her infant child had become a resident of Brooklyn, applied to the surrogate of Kings county by petition, for ancillary letters of administration, the petition setting forth among other things the granting of the letters in New Jersey, and that the decedent left personal estate in Kings county of the value of about $40,000, that one Moses P. Prout, of Brooklyn, is or claims to be a creditor of the decedent, and that there was no other person claiming to be a creditor known to the petitioner. The surrogate thereupon issued a citation to creditors of the decedent and on the hearing Moses P. Prout presented affidavits to the effect that the decedent was indebted to him in the sum of $7,371.73, with interest; that the decedent at his death was the owner of securities to the amount above mentioned, deposited in a safe deposit company in Brooklyn; that the only security given by the administratrix was the bond of $5,000, and that she had no pecuniary responsibility apart from her interest as widow in the estate of the decedent. The surrogate made an order that ancillary letters be granted to the widow on condi-

tion that she should give a bond, with sureties, to be approved by the surrogate, in a penalty of double the value of that part of the personal estate of which the deceased died possessed, which at his death was within the county of Kings.

The administratrix appeals from the order on the ground that the surrogate had no power to require a bond upon the application for ancillary letters, in a penalty exceeding twice the amount of the debts owing by the intestate to creditors within the state. This question depends upon the true construction of section 2699 of the Code of Civil Procedure. That section is as follows: "Upon the return of the citation, the surrogate must ascertain, as nearly as he can do so, the amount of debts due, or claimed to be due, from the decedent to residents of the state. Before ancillary letters are issued, the person to whom they are awarded must qualify, as prescribed in article fourth of this title, for the qualification of an administrator upon the estate of an intestate; except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the state, as will, in the surrogate's opinion, effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive, from the persons to whom the letters are issued, upon an accounting and distribution, either within the state or within the jurisdiction where the principal letters were issued."

If the surrogate had power to impose, as a condition to the granting of letters ancillary, that the administratrix should give a bond to secure the whole fund which might come to her hands by virtue of such letters, the imposition of the condition was a discreet exercise of such power. The general rule in this and other states requires that the administrator should give security in double the value of the personal estate of an intestate before assuming the administration. The actual location of the personal estate or of the securities by which it is represented, is not under our statute material in determining the amount of the bond in a case of purely domestic

administration, for the rule that personal property is deemed to follow the person of the owner, fixes the legal possession in the intestate at his place of residence, wherever in fact the property may be. Where the administrator has properly qualified and assumed the administration in the state of the domicile, he is invested with power to receive the debts owing to the intestate and take possession of the securities and give proper acquittances wherever the debtors or securities may be, whether within or without the state. But where the debtor or the securities are in a foreign jurisdiction, and are not voluntarily paid or surrendered to the administrator of the place of the domicile of the intestate, the courts of the foreign jurisdiction will not enforce the recovery of the debts or securities upon his application until he has procured ancillary letters or a new administrator has been authorized under the laws of the place where assets may be. It is unnecessary to enter into the reasons of this rule. They are familiar and the rule has been frequently recognized. (See *Parsons* v. *Lyman*, 20 N. Y. 103; *Despard* v. *Churchill*, 53 id. 192; *In re Hughes*, 95 id. 55.)

The unquestioned rule of the common law that the succession to and the distribution of the estate of an intestate is governed by the law of the domicile, makes security there taken on the granting of letters of administration covering the whole personal estate of the intestate, an adequate protection to all parties interested, and where ancillary letters are applied for in another state or jurisdiction, there would not seem to be any necessity that additional security should be required were it not for another principle almost universally recognized, that the claims of creditors living in a jurisdiction where ancillary letters are sought, are entitled to have their just right in the assets of the intestate secured by a proper bond as a condition of granting the application. To this end security is usually required to be given by the applicant for ancilliary administration enforceable in the tribunals of the place for the protection of creditors therein residing. The course of legislation in this state upon the subject of ancillary

administration and the security required may be briefly stated. The Revised Statutes enacted that "every person appointed administrator" should give a bond in a penalty not less than twice the value of the personal estate of which the deceased died possessed. Provision was made for granting letters on the application of foreign executors or administrators where persons, not inhabitants of this state, shall die leaving assets here. (§ 31.) There was no provision exempting persons applying for ancillary letters from the operation of the general rule declared in section 42, and it would seem that they, as well as domestic administrators, were required to give a bond in a penalty twice the value of the property upon which administration was sought. Section 2699 of the Code of Civil Procedure undertook to define the practice on the application for ancillary administration, which was left much at large under the Revised Statutes. In construing the section the various conditions to be provided for may justly be considered. There may be domestic creditors entitled to protection. The assets in this state may be less or more than sufficient to provide for the rights of citizens here. Or again there may be no creditors. Ancillary letters may become necessary to enable the administrator or executor to recover assets by hostile proceedings out of the jurisdiction where the principal letters were issued. It is contended on the part of the appellant that on an application for ancillary letters under section 2699, no security can be required in any case, exceeding twice the amount of claims of domestic creditors and that the discretion of the surrogate is only to be exercised within this limit. It is evident that this construction would in the present case defeat the general policy which requires an administrator to give adequate security for the whole estate which may come to his hands. The security given in New Jersey was limited to the sum of $5,000, double the value of the personal estate of the intestate in his actual possession there, taking no account of the much larger amount in this state, and this course seems to have the sanction of the New Jersey courts. (*Lewis* v. *Grognard*, 17 N. J. Eq. 425.)

The contention of the appellant, if sustained, would enable the administratrix to take into her possession $40,000 in securities belonging to the estate, without any security except a bond not exceeding double the amount of the debt of $7,305, alleged to be due to Moses P. Prout. It may be that the primary purpose of section 2699 was the protection of domestic creditors. The citation is required to be issued to creditors only (§ 2698). The legislature may have assumed that proper and adequate general security would be exacted by the law of the place of the principal administration. But although the language of section 2699 is vague, we think it is capable of a construction which will subserve the general policy of the law. The legislature in this section first declares a general rule, that before ancillary letters are issued, the person to whom they are awarded must qualify as provided in the fourth article of the title for the qualification of an administrator upon the estate of an intestate. Referring to the fourth title it is found that section 2667 prescribes as one of the acts to be done by an administrator, to qualify him for the office, that he shall execute a bond in a penalty not less than twice the value of the personal property of which the intestate died possessed, subject to certain exceptions, one of which is that with the consent of all the next of kin of the intestate, the bond may, upon notice being given to creditors, be limited to twice the amount of their debts. The exception in section 2699, was we think intended to give the surrogate a discretion to modify the general rule declared in the preceding clause and to accept a bond less in amount than that prescribed in ordinary cases of administration, if by reason of adequate security having already been given, additional security for the protection of the general interests was not in his judgment required, or where the next of kin had consented to waive security, and in a case of domestic creditors where their protection was the only interest involved, to prescribe a limit beyond which security should not be exacted.

It is somewhat difficult to so construe the language. But the solicitude with which courts guard the rights of infants

and persons standing in the relation of beneficiaries of trusts, and the uniform policy in respect of security required of administrators, justify the court in going to the verge of construction in order to protect parties so situated and to carry out the general policy of the law.

We think the order should be affirmed.

All concur.

Order affirmed.

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128 77
135 602

128 77
144 273

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149 121

128 77
156 521

THE CITIZENS' BANK of Perry, N. Y., Respondent, *v.* HELEN A. WILLIAMS, Appellant.

It is not a fraud as matter of law for the members of a firm to appropriate the firm property to the payment of a debt, for which they are all liable, although not a firm indebtedness, and one of the copartners who is jointly liable with the others, may appropriate his individual property for the payment of the joint debt.

Where, therefore, an attachment was obtained on the ground that the members of a firm had made an assignment with intent to defraud their creditors, and the only claim of fraud set forth in the moving papers was that the copartners gave their joint and several promissory notes for the individual debt of one of them, the other signing as surety, and that thereafter as a firm, and as individuals they executed the assignment, in which they directed that the notes should be paid out of the proceeds of the firm property, *held*, that the denial of a motion to vacate the attachment upon the papers on which it was granted was error.

Wilson v. *Robertson* (21 N. Y 587), distinguished.

As to whether if the firm assets were in the hands of a court of equity to be administered according to equitable principles, the court would direct the firm debts to be first paid, *quære*.

(Argued June 5, 1891; decided June 16, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made the first Tuesday of January, 1891, which affirmed an order of Special Term refusing to vacate an attachment.

The nature of the action and the facts, so far as material, are stated in the opinion.

Statement of case.

B. Frank Drake and *Owen Harris* for appellant. The orders are appealable, as the motions were made on the ground that the affidavits on which the attachments were granted contain no evidence that the defendants had fraudulently disposed of property. (*Morris* v. *Talcott*, 96 N. Y. 100; *S. C. Bank* v. *Alberger*, 78 id. 252; *Allen* v. *Meyer*, 73 id. 1.) It is not fraudulent for insolvent partners to voluntarily dedicate to the payment of a debt the property which the creditor, by legal process, could have sold to satisfy that debt. The preference of such a debt is not evidence of that "intent" to defraud partnership creditors which entitles them to an attachment. (*Hubbard* v. *Gurney*, 64 N. Y. 457; *Palmer* v. *Purdy*, 83 id. 144; *Hoyt* v. *Mead*, 13 Hun, 327; Code Civ. Pro. § 454; *Marsh* v. *Dunckel*, 25 Hun, 167; *Carman* v. *Plas*, 23 N. Y. 286; *Decker* v. *Gallord*, 8 Hun, 110; *Wells* v. *Mann*, 45 N. Y. 327; *Newcomb* v. *Hale*, 90 id. 326; *Saunders* v. *Riley*, 105 id. 12; *Kelly* v. *Scott*, 49 id. 595; *Chapin* v. *Thompson*, 89 N. Y. 271; *Terry* v. *Butler*, 43 Barb. 395; *Crook* v. *Rindskopf*, 105 N. Y. 476; *Dimon* v. *Hazard*, 32 id. 65; *Stanton* v. *Westover*, 101 id. 265; Bates on Part. § 191; *Bank of Buffalo* v. *Thompson*, 121 N. Y. 280; Lindley on Part. 192; *In re Gray*, 111 N. Y. 405; *Brinkerhoff* v. *Marvin*, 5 Johns. Ch. 320; *Turner* v. *Jaycox*, 40 N. Y. 470.) A warrant of attachment cannot be granted for the sole reason that the defendants have applied partnership assets to pay debts which both partners owe, without proof of an intent to defraud. (Code Civ. Pro. § 636; *Millikin* v. *Dart*, 26 Hun, 24; *Belmont* v. *Lane*, 22 How. Pr. 365; *Place* v. *Miller*, 6 Abb. [N. S.] 178; *S. R. A. E. Co.* v. *Harwood*, 30 Hun, 9; *Neal* v. *Clark*, 95 U. S. 704; 111 id. 676; *Palmer* v. *Hussey*, 87 N. Y. 303; *Stratford* v. *Jones*, 97 id. 568; *Lawrence* v. *Harrington*, 122 id. 408–412; 3 Kent's Comm. 65; *Bogert* v. *Haight*, 9 Paige Ch. 297; *Morrison* v. *Atwell*, 9 Bosw. 503; *Scott* v. *Guthrie*, 10 id. 409; *Powers* v. *Graydon*, Id. 530; *Fox* v. *Heath*, 16 Abb. Pr. 163; *Richardson* v. *Harron*, 39 Hun, 537, 540; *Crook* v. *Rindskopf*, 105 N. Y. 476–488; *Haynes* v. *Brooks*, 116 id. 487.) The affidavits do not state

Statement of case.

a case for the consideration of the questions on which the opinion of the General Term is based. (*Bonnell* v. *Griswold*, 68 N. Y. 294; *United States* v. *Ames*, 99 U. S. 35; *B. C. Inst.* v. *Bitter*, 87 N. Y. 250, 256; *Bernheimer* v. *Rindskopf*, 116 N. Y. 428.)

Eugene M. Bartlett, *George F. Danforth* and *Morris A. Lovejoy* for respondent. The affidavits are sufficient to authorize the issuing of the attachments. (*Bernheimer* v. *Rindskopf*, 116 N. Y. 428.) If there is any evidence of a fraudulent disposition of their property by the defendants, this court has no jurisdiction to review the decision of the General Term thereon. (*Allen* v. *Meyer*, 73 N. Y. 1; *White* v. *Reichert*, 14 Wkly. Dig. 285; *Frankel* v. *Hays*, 20 id. 417; *Hamburger* v. *Moeller*, 4 N. Y. S. R. 447; *Jaffray* v. *Nast*, 32 id. 250.) The Clark notes preferred in the assignment and payable out of the copartnership property are the individual debts of Helen A. Williams. (*Tallman* v. *Colgrove*, 67 N. Y. 96; *Millard* v. *Thorn*, 56 id. 406; *Londalfo* v. *Appleton*, 40 id. 542.) As the debt to Clark was the individual debt of one partner only — in no sense a firm debt or obligation — it follows that, by reason of the appropriation by the firm of partnership property to its payment, the assignment which directs that appropriation must be deemed fraudulent and void. (*Wilson* v. *Robertson*, 21 N. Y. 587; *Menagh* v. *Whitwell*, 62 id. 162; *Hulbert* v. *Dean*, 2 Keyes, 97; 2 Abb. Ct. App. Dec. 428; *Turner* v. *Jaycox*, 40 N. Y. 470; *Forsyth* v. *Woods*, 11 Wall. 484; *Kelly* v. *Scott*, 49 N. Y. 17; *Kirby* v. *Schoonmaker*, 3 Barb. Ch. 46; *Case* v. *Beauregard*, 99 U. S. 119; *Bulger* v. *Ross*, 119 N. Y. 495; *Nordlinger* v. *Anderson*, 34 N. Y. S. R. 361; *Coster* v. *Clark*, 3 Edw. Ch. 411.) An attachment may issue against the property of a firm who have made an assignment preferring the individual debt of one of the partners. (Code Civ. Pro. § 336; *Hirsch* v. *Hutchinson*, 3 Civ. Pro. Rep. 106; *Victer* v. *Henlein*, 34 Hun, 562; *Bulger* v. *Ross*, 119 N. Y. 465; *Collumb* v. *Caldwell*, 16 id. 486; *Frund* v. *Michaelis*, 15 Abb. [N. C.] 357.)

Opinion of the Court, per EARL, J.

EARL, J. The defendants were copartners in the mercantile business at Perry, Wyoming county, under the firm name of Williams & Co., and in their firm name, they executed a note to the plaintiff for borrowed money. It commenced this action and obtained an attachment against them on the ground that they had assigned their property with intent to defraud their creditors. They made a motion to set aside the attachment, based upon the same papers upon which it was granted, and the motion was denied at the Special Term, and the decision there was affirmed at General Term, and then the defendants appealed to this court.

The allegation of fraud against the defendants is based upon the following facts: At the time the defendants became partners, Helen A. Williams owed E. M. Clark about $800, and for that indebtedness they gave him their two joint and several promissory notes signed by them. L. Sophia Williams, however, signed the notes simply as surety for Helen A. Williams, who was and remained the principal debtor. Thereafter, in February, 1890, the defendants having become insolvent, both as a firm and as individuals, executed a general assignment of all their firm and individual property for the benefit of their creditors, in which they directed the two notes held by Clark to be paid out of the proceeds of the firm property; and the fraud alleged by the plaintiff consists in this direction, the claim being that the notes were not firm debts, but the individual debts of Helen A. Williams, for which L. Sophia Williams was only surety, and that, therefore, it was necessarily a fraud in law upon the firm creditors to appropriate the proceeds of firm property for their payment.

We think the learned courts below fell into error in granting and upholding the attachment upon the grounds specified. These notes were joint debts of the defendants, for which they were jointly liable to Clark, and it was, therefore, not a fraud to appropriate their joint property for their payment. Clark could have recovered a judgment upon the notes against the defendants, and could by execution have seized the firm property to satisfy the judgment, and a purchaser at the execution

sale would have obtained a full and absolute title to the firm property purchased. Although the defendants were insolvent, they could have paid these debts either in money or in property belonging to the firm, and in so doing, they would have perpetrated no fraud upon their creditors. As they could pay the debts either with firm money or firm property, we cannot perceive why they could not, through an assignee, direct the same debts to be paid out of the proceeds of the firm property. It certainly cannot be a fraud upon firm creditors to apply firm property to the payment of debts for the satisfaction of which such property could be taken.

It is a mistake to suppose that the firm property is now in the hands of a court of equity for distribution and application upon equitable principles. No suit whatever is pending in equity, and no application has been made to a court of equity in reference to the firm property. The defendants have made an assignment of their firm property authorized by law, and the assignee is to dispose of it, not in accordance with the directions of any court, but in precise accordance with the terms and conditions of the assignment. It may be that if these firm assets were to be administered in a court of equity, according to equitable principles, the court would direct the firm debts to be paid before these debts to Clark, although it is not certain that it would do so, and it is not now necessary to determine whether it would or not. (*Hoare* v. *Oriental Bank*, L. R. [2 Appeal Cases] 589.) These defendants, being jointly liable to Clark, have themselves provided that his claims shall be paid out of the firm assets, and there is no room for the interference of any court. As between him and them his claim upon the firm property is just as meritorious and equitable as the claim of firm creditors.

After the execution of the assignment and the provision made therein for the payment of these debts, L. Sophia Williams had no equitable claim that the firm property should not be applied precisely as she had directed that it should be applied. Hence on the principles of subrogation the firm

creditor can take no equity from her which they can enforce against the firm property, upon principles laid down in the case of *Saunders* v. *Reilley* (105 N. Y. 12), and cases therein cited.

If these notes had been the individual debts of Helen A. Williams, for which L. Sophia Williams was in no way liable, then the provision in the assignment for their payment out of firm assets would have been a fraud upon the firm creditors within the case of *Wilson* v. *Robertson* (21 N. Y. 587). The ground of that decision was that the joint property was appropriated for the payment of an individual debt of one of the members of the firm, for which the other member was in no way liable. But no case can be found holding that it is a fraud upon the firm creditors for the members of a firm to appropriate the firm property to the payment of debts for which they are all liable. It is never a fraud upon the creditors of any person to appropriate his property for the payment of a debt for which he is liable; and so one who is jointly liable with others as a member of a firm or otherwise, may appropriate his individual property for the payment of a joint debt, for the reason that he is liable to pay the joint debt, and his property could be seized by virtue of an execution issued upon a judgment for the joint debt to satisfy the same. (*Crook* v. *Rindskopf*, 105 N. Y. 476.)

No benefit or ultimate advantage is secured to L. Sophia Williams by the appropriation of the firm property for the payment of debts which, as between her and Helen A. Williams are the debts of the latter. Upon payment of these debts there will be in the hands of the assignee a claim for the reimbursement of the firm against the individual estate of Helen A. Williams. That claim will be in the hands of the assignee to be administered and disposed of under the assignment, and no benefit therefrom can come to either member of the firm until after the payment of all the firm and individual debts.

We, therefore, see no reason to doubt that the assignment was valid and free from the imputation of fraud.

Statement of case.

The orders of the General and Special Terms should be reversed and the motion granted, with costs in all the courts and ten dollars costs of the motion.

All concur.

Order reversed.

128	88
152	168

128	83
j165	105

THE OREGON PACIFIC RAILROAD COMPANY, Appellant, *v.* GEORGE J. FORREST et al., as Executors, etc., Respondents.

It seems that a consideration is not an essential part of an executed contract.

An agreement to rescind a previous contract containing mutual stipulations imports that, until rescinded, it was recognized as subsisting and binding by both parties, and the mutual releases form a sufficient valid consideration for the new agreement.

A contract obtained by duress is not ordinarily void, but merely voidable, and may be subsequently ratified and confirmed, and the party claiming to have been constrained, by afterwards voluntarily acting upon it, thereby affirms its validity and loses the right to avoid it.

One entitled to repudiate a contract on the ground of duress, should act promptly.

In an action to recover possession of 100 bonds issued by plaintiff, it appeared that the bonds in suit, with others, were delivered to G., defendant's testator, under an agreement on his part to furnish plaintiff certain rails and other railroad material; that G., having failed to take any steps towards performing the contract, although urged so to do, plaintiff's president, without notifying G. that if he did not perform, the contract would be considered rescinded, purchased the rails, notified G. of this, claimed that the contract had been broken and demanded a surrender of the bonds. G. refused to surrender or to consent to the cancellation of the contract, unless he was allowed to retain 100 of the bonds. Thereupon an agreement was made between them that the contract should be canceled and surrendered, G. to retain the bonds in question upon his surrendering the others, which he did. Interest on the bonds in suit was paid by plaintiff to G. and his executors for about six years, when this action was commenced. Plaintiff claimed that the agreement of cancellation was void, because without consideration; also that it was invalid, because obtained by duress. *Held*, that a verdict was properly directed for defendants; that said agreement was founded upon a sufficient consideration, and if obtained by duress was subsequently ratified and confirmed.

(Argued June 2, 1891; decided June 16, 1891.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 23, 1890, which affirmed a judgment in favor of defendant, entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph H. Choate for appellant. On August thirteenth, Garrison had not complied with the terms of the contract, to purchase rails deliverable in San Francisco at as early a date as reasonably practicable, and on that day as he admitted, he had broken the contract. (*Hedges* v. *H. R. R. R. Co.*, 49 N. Y. 223; *Colt* v. *Owens*, 90 id. 368; *N. H., etc., Co.* v. *Quintard*, 6 Abb. [N. S.] 128.) The transaction of August thirteenth is void for duress. (*Scholey* v. *Mumford*, 60 N. Y. 498; *McPherson* v. *Cox*, 86 id. 472; *Vaughn* v. *Village of Port Chester*, 43 Hun, 427; *Foshay* v. *Ferguson*, 5 Hill, 154; *Guilleaume* v. *Rowe*, 94 N. Y. 268; *Hamilton* v. *Cummings*, 1 Johns. Ch. 516, 523; *G. M. L. Ins. Co.* v. *Reals*, 79 N. Y. 202; *Merton* v. *Belden*, 49 id. 373; *Buckingham* v. *Corning*, 91 id. 525; *Moons* v. *Townshend*, 102 id. 387, 392; Story's Eq. Juris. § 700; Pom. Eq. Juris. § 914.) The trial court erred in withdrawing the case from the jury and in directing a nonsuit. (*Stone* v. *Flower*, 47 N. Y. 566; *Frecking* v. *Rolland*, 53 id. 424; *Clemence* v. *Auburn*, 66 id. 338; *Weil* v. *D. D., etc., R. R. Co.*, 121 id. 152; *Adams* v. *Irving Bank*, 116 id. 614; *Dunham* v. *Griswold*, 100 id. 226; *Potter* v. *Greene*, 39 Hun, 72, 78; Code Civ. Pro. § 829; *Lyon* v. *Park*, 111 N. Y. 350.)

Horace Russell for respondents. The agreement of August thirteenth was based upon a sufficient consideration, viz., the rescission and cancellation of the agreement of June thirteenth. (Bishop on Cont. §§ 68, 81; *Tice* v. *Zinsser*, 76 N. Y. 549; *Rollins* v. *Marsh*, 128 Mass. 116, 120; *Cutter* v. *Cochran*, 116 id. 408; *Mfg. Co.* v. *Bradley*, 105 U. S. 175; *Delacroix* v. *Bulkley*, 13 Wend. 75; *Hadden* v. *Dimmick*, 48 N. Y. 661;

Statement of case.

13 Abb. [N. S.] 135; 31 How. Pr. 196; *Perry* v. *Buckman*, 33 Vt. 10; *Brinley* v. *Tibbitts*, 7 Me. 70; *Flagg* v. *Dryden*, 7 Pick. 52; *Crans* v. *Hunter*, 28 N. Y. 394; *Stewart* v. *Ahrenfeldt*, 4 Den. 189; *Seaman* v. *Seaman*, 12 Wend. 381; *Russell* v. *Cook*, 3 Hill, 504; *Allen* v. *Jaquish*, 21 Wend. 628; *Dearborn* v. *Cross*, 7 Cow. 48; *Jenks* v. *Robertson*, 2 T. & C. 255; 58 N. Y. 621; *Horgan* v. *Krumweide*, 25 Hun, 116; *Coe* v. *Hobbey*, 7 id. 157, 163; 72 N. Y. 146; *Townsend* v. *Masterson*, 6 Duer, 208; *Lawrence* v. *Parker*, 8 Wkly. Dig. 533.) The agreement of August thirteenth was that of the plaintiff, although the words "as president," are not attached to the president's signature thereto. (*Olcott* v. *T. R. R. Co.*, 27 N. Y. 546, 556; *Van Leuven* v. *F. N. Bank*, 54 id. 671; *Coleman* v. *F. N. Bank*, 53 id. 388; *Pierson* v. *Bank*, 77 id. 304; *Hoag* v. *Lamonte*, 60 id. 96; *Lee* v. *P. C. & M. Co.*, 56 How. Pr. 373; *Rolling Mill* v. *R. R. Co.*, 120 U. S. 256; *Scott* v. *M. R. R. Co.*, 86 N. Y. 200; *Whitney* v. *U. T. Co.*, 65 id. 577; *Ellsworth* v. *St. L. A. & T. R. R. Co.*, 33 Hun, 7; 98 N. Y. 648; *S. H. B. Co.* v. *E. H. B. M. Co.*, 90 id. 616; *Hoyt* v. *Thompson*, 19 id. 207.) Conceding that the agreement of August thirteenth, which permitted Garrison to retain the bonds in question, was obtained by duress of goods, the plaintiff thereafter affirmed and ratified that agreement. (*Lyon* v. *Waldo*, 36 Mich. 345; Pars. on Cont. [7th ed.] 446; 1 Addison on Cont. §§ 314, 454; Bishop on Cont. § 728; 1 Chitty on Cont. 273; *Burton* v. *Story*, 3 Wend. 236; *Gould* v. *C. C. N. Bank*, 86 N. Y. 82; *Baird* v. *Mayor, etc.*, 96 id. 567; *Bruce* v. *Davenport*, 3 Keyes, 472; *Tarbell* v. *S. Co.*, 110 N. Y. 170; *Bennett* v. *Ins. Co.*, 67 id. 274; *Wright* v. *Bank of Metropolis*, 110 id. 237; *Roth* v. *B. & S. L. R. R. Co.*, 34 id. 548; *Hedges* v. *H. R. R. R. Co.*, 49 id. 223; *Craig* v. *Parkis*, 40 id. 181; *Davis* v. *Gwynne*, 57 id. 676; *Hunt* v. *Maybee*, 7 id. 266.) The plaintiff cannot recover in this action, because it did not, before bringing the action, restore or offer to restore the defendants or their testator to the position in which he was before the agreement of August

13, 1881, was made. (*Getty* v. *Devlin*, 54 N. Y. 414, 415; *Sinclair* v. *Neill*, 1 Hun, 80; *Francis* v. *N. Y. E. R. R. Co.*, 17 Abb. [N. C.] 288; *Voorhies* v. *Earl*, 2 Hill, 288; *Masson* v. *Bovet*, 1 Den. 69, 74; *Clarke* v. *Dickson*, El. Bl. & El. 148; 96 Eng. Com. Law. 148; *Hammock* v. *Pennock*, 61 N. Y. 145; *Tice* v. *Zinsser*, 76 id. 549.) There was in fact no duress. (*Skeate* v. *Beale*, 11 Ad. & El. 983; *Preston* v. *Boston*, 12 Pick. 14; *Wilcox* v. *Howland*, 23 id. 167; *Atlee* v. *Backhouse*, 3 M. & W. 633.) The court could not have directed a verdict for the plaintiff based on the assumption that Hogg's testimony must be taken as true because he related conversations with the dead, who could not rise to contradict him. (*Elwood* v. *W. U. T. Co.*, 45 N. Y. 549; *Kavanaugh* v. *Wilson*, 70 id. 177; *Sipple* v. *State*, 99 id. 284, 290; *Wohlfart* v. *Beckert*, 92 id. 490, 497; *Koehler* v. *Adler*, 78 id. 287; *Keller* v. *W. & B. Co.*, 39 Hun, 356.) The plaintiff's exception to the admission of the affidavit of Bentley, the plaintiff's secretary, to which are attached the plaintiff's by-laws, the resolutions of its executive committee and copies of the checks by which the interest coupons on the bonds held by Garrison were paid, was not well taken. (Code Civ. Pro. §§ 803, 931.)

EARL, J. This action was brought against the executors of Cornelius K. Garrison to recover the possession of one hundred first mortgage bonds issued by the plaintiff, of which it claims to be the owner and entitled to the immediate possession. It is alleged in the complaint that the plaintiff on or about the 1st day of October, 1887, duly demanded of the defendants the delivery to it of the bonds, and that the defendants had failed and refused to deliver the same, or any of them to it; and relief is prayed that the defendants may be adjudged to deliver to the plaintiff the bonds, or that it may have judgment for $202,500, in case a delivery cannot be had, together with its damages and costs. The answer put in issue the plaintiff's right and title to the bonds, and claimed that the defendants were entitled to hold and possess the same under an agreement

between it and their testator, made on or about the 13th day of August, 1881.

The material facts are as follows: On the 13th day of June, 1881, the plaintiff and Cornelius K. Garrison entered into a contract, under seal, by which Garrison agreed to purchase five thousand tons of English steel rails, deliverable in San Francisco at as early a day as reasonably practicable, and agreed to sell and deliver to the plaintiff the rails so bought upon arrival there of each shipment upon receiving in cash the actual cost to him of the rails and the further sum of $100,000 in the first mortgage bonds of the plaintiff, and he agreed to furnish the necessary fish-plates, bolts, nuts, spikes and fittings for the rails, deliverable in San Francisco at the same time with the rails, and sell and deliver the same to the plaintiff upon the arrival of each shipment at that place at the net cost to him. And it agreed to purchase from him the rails, fish-plates, bolts, nuts, spikes and fittings upon arrival of each shipment at San Francisco, and pay for the same in cash and bonds as provided. It also agreed to deposit with Garrison, as a guarantee for the performance of the agreement on its part, three thousand of its first mortgage bonds for one thousand dollars each, one hundred of which bonds he was to retain, and he was to hold the remaining twenty-nine hundred bonds until it had taken and paid for the rails, fish-plates, etc., in full, including interest and all proper charges, provided that it might withdraw any part of the bonds upon paying to Garrison sixty per cent of their par value. It further agreed to give to Garrison the same bonus in its full-paid stock upon the one hundred bonds that he was to retain that he would be entitled to *pro rata* with the most favored purchaser of any of its bonds. Garrison was also to loan to it an amount equal to the difference between the cost to him of the rails, fish-plates, etc., and $200,000, the bonds deposited with him being held as security for such loan; and it agreed to purchase from Garrison the one hundred bonds mentioned, together with their *pro rata* of stock, and pay him therefor $100,000 at any time he might

elect to sell the same to it. In pursuance of that contract the three thousand bonds were delivered to Garrison, and he thus became obligated to furnish the steel rails, fish-plates, etc., as provided. It appears in evidence that these rails were expected to be purchased and that they could only at that time be purchased in England, and that they were to be shipped from that country by vessels to San Francisco. The negotiations in reference to the agreement and its performance were conducted mainly between Mr. Hogg, the president of the plaintiff, and Cornelius K. Garrison and W. R. Garrison, his son and general agent. English steel rails were easily purchasable in England in the summer of 1881, but it was difficult to get steamers to transport them to San Francisco. Cornelius K. Garrison died on the 1st day of May, 1885, and W. R. Garrison died on the 1st day of July, 1882; and this action was commenced on the 1st day of October, 1887, and the only person then living who had personal acquaintance with the main facts out of which the plaintiff's alleged cause of action arose, was Hogg, who was its main witness upon the trial.

It appears that on the 21st day of July, 1881, the plaintiff received back from Garrison four hundred of the bonds referred to in the agreement, but for what cause or upon what consideration they were surrendered by Garrison to it does not appear. The evidence tends strongly to show that during the two months after the execution of the contract, Garrison did very little, if anything, towards its performance. It does not appear that he had purchased any rails or that he had made any effort to purchase any, or to procure vessels to transport the rails when purchased. It does appear that Hogg, on behalf of the plaintiff, from time to time, urged performance of the contract, and that finally about the first day of August, Hogg, on behalf of the plaintiff and upon credit furnished by him, purchased the rails. On the thirteenth day of August, he notified Garrison that he had purchased them, and he then claimed that Garrison had broken the contract with the plaintiff and that he should hold him responsible, and he then demanded the surrender of the balance of the bonds remain-

ing in the hands of Garrison. He refused to surrender any of the bonds unless it consented that he should have the one hundred bonds which he was entitled to under the contract, and threatened to retain all the bonds unless it would consent to surrender the one hundred. Thereupon, there was a proposition from one of the parties to the other that the contract of June thirteenth should be canceled and surrendered, and that Garrison should have and retain one hundred of the bonds upon surrendering the remainder thereof.

The by-laws of the plaintiff provided for an executive committee who should possess, and exercise by a majority of its members, all the powers and duties of the board of directors when the board was not in session; and at a meeting of the executive committee held on the thirteenth day of August, the president was authorized to negotiate with Garrison for the cancellation and abrogation of the contract existing between him and the plaintiff, and to close the transaction on the terms proposed, in his discretion. It will be observed that in the negotiations between Hogg and Garrison both parties acted upon the supposition that the contract of June thirteenth was in force, and the resolution of the executive committe recognized that contract as existing.

In pursuance of the authority thus conferred upon him, Hogg entered into the following agreement with Garrison:

"For and in consideration of One Hundred Thousand Dollars in bonds of the Oregon Pacific Railroad Co. and six hundred shares full-paid stock (the receipt whereof is hereby acknowledged) paid by the Oregon Pacific R. R. to C. K. Garrison, the within agreement is hereby canceled and satisfied, and the Oregon Pacific R. R. Co. hereby acknowledges the receipt of twenty-five hundred bonds of One Thousand Dollars each, being the remainder of the three thousand bonds mentioned in the agreement hereto annexed."

Thereupon the agreement of June thirteenth was canceled, and Garrison surrendered to the plaintiff the remainder of the bonds, after retaining the one hundred to which he was entitled under the agreement. It paid to Garrison and his assignee

and his executors, after his death, the semi-annual interest coupons, the last being paid two days after the commencement of this action.

The plaintiff bases its right to recover these bonds upon the following grounds: (1) That the agreement of August 13, 1881, surrendering the bonds to Garrison, was without consideration and, therefore, void; and (2) that the contract was invalid for having been obtained by Garrison through duress.

As to the first ground: This was an executed agreement, and there is authority for saying that it was valid without any consideration. In Bishop on Contracts (§ 81), it is said: "Though a contract is without consideration, yet, if it is voluntarily and with full knowledge of the facts executed, the property in the thing, whether money or a chattel, is transferred, and it cannot be reclaimed. So that a consideration is not an essential part of an executed contract." And so it was substantially held in *Maxwell* v. *Graves* (59 Iowa, 613).

But it is not needful to go so far in this case. It is quite clear that, upon the facts as they now appear (and assuming that they all appear), Garrison could not have maintained an action against the plaintiff based upon the contract of June thirteenth, for the reason that he had failed to perform the same on his part. There was room, however, for a claim, on his part, that the contract was still in force, and that on the thirteenth of August, he was still able to perform the same and to discharge the obligations thereof. It does not appear that, down to that time, the plaintiff had made any formal demand for the performance of the contract, or had notified him that, in case he did not perform, it would regard the contract as at an end. Without giving him such a notification, its president had, some two weeks before that time, made other arrangements for obtaining the rails, and on the thirteenth of August notified him that the plaintiff would hold him responsible for not performing his contract. He refused to assent to the nullification or cancellation of the contract of June thirteenth, unless the plaintiff would surrender to him one hundred of the bonds in his possession, and for the pur-

pose of procuring a cancellation of the agreement and the surrender by Garrison to it of the remainder of the bonds, it entered into the agreement of August thirteenth; and the cancellation of the first agreement and the mutual release of the parties therefrom furnished ample consideration for the contract of August thirteenth. (Bishop on Contracts, § 68; *Cutter* v. *Cochrane*, 116 Mass. 408; *Rollins* v. *Marsh*, 128 id. 116; *Perry* v. *Buckman*, 33 Vermont, 7; *Delacroix* v. *Bulkley*, 13 Wend. 75; *White* v. *Hoyt*, 73 N. Y. 505; *Tice* v. *Zinsser*, 76 id. 549; *McCreery* v. *Day*, 119 id. 1; *Manufacturing Co.* v. *Bradley*, 105 U. S. 175.) In *Cutter* v. *Cochrane*, it is said: "An agreement to rescind a previous contract imports that, until it is rescinded, it is recognized by both parties as subsisting and binding. The rescinding of a previous contract containing mutual stipulations, is a release by each party to the other. The release of one is the consideration for the release of the other, and the mutual releases form the consideration for the new promise, and are sufficient to give it full legal effect."

Therefore, taking into view all the evidence, we see no reason to doubt that the contract of August thirteenth surrendering the one hundred bonds to Garrison, was based upon a sufficient consideration.

As to the second ground upon which the plaintiff bases its action, to wit., that the contract of August thirteenth was invalid because it was procured from it by duress, and that the bonds were coerced from it by a threat on the part of Garrison that he would not deliver to it any of the bonds held by him unless the one hundred bonds were surrendered to him, we have to say: A contract obtained by duress is not ordinarily void but merely voidable, and it may be subsequently ratified and confirmed. (*Doolittle* v. *McCullough*, 7 Ohio State, 299; *Lyon* v. *Waldo*, 36 Mich. 345.) In 1 Parsons on Contracts (7th ed.) 446, it is said: "A contract made under duress is not, strictly speaking, void, but only voidable, because it may be ratified and affirmed by the party upon whom the duress was practiced." In 1 Addison on Contracts (Morgan's edition),

454, it is said: "Any agreement made under improper pressure is voidable. If a person having been constrained by duress to make a contract, afterwards voluntarily acts upon it, he thereby affirms its validity and loses the right to avoid it." In Chitty on Contracts (11th Am. ed. 273), it is said: "Clearly a contract made under duress would be available in favor of the parties suffering the duress and against the party affected by the same. * * * And so by our law a man who has entered into a contract under duress may either affirm or avoid such contract after the duress has ceased." See, also, Bishop on Contracts (§ 278).

The facts constituting the duress were immediately known to the plaintiff and it was its duty to act promptly in repudiating the agreement which it had been induced to enter into by duress. Instead of so doing it never repudiated the agreement until it commenced this action, more than six years after the agreement of August thirteenth had been entered into and the bonds had been surrendered to Garrison; and during all that time down to the commencement of this action, it paid the semi-annual interest coupons upon the bonds. Even if it was induced to pay the interest during the life-time of Garrison by promises on his part to extend financial aid in other ways to the plaintiff, the conduct of the plaintiff was, nevertheless, a complete and express ratification of the agreement of August thirteenth. If it surrendered its right to repudiate that agreement on account of duress it should have taken its remedy by holding Garrison to the agreement he made with it for financial aid; but it continued to pay the interest upon these bonds for several years after Garrison had failed to keep the alleged promise he had made for financial aid to the plaintiff and after all efforts and negotiations in that direction had ceased. During several years prior to the commencement of this action the payment of interest upon these bonds was entirely voluntary. It thus emphatically and repeatedly acknowledged the defendants' title to the bonds, and when this action was commenced it was too late to claim that they had been obtained by duress.

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One entitled to repudiate a contract on the ground of duress should, like one who attempts to repudiate a contract on the ground of fraud, act promptly. (*Schiffer* v. *Dietz*, 83 N. Y. 300; *Gould* v. *Cayuga County Nat. Bank*, 86 id. 82; *Baird* v. *Mayor, etc.*, 96 id. 567; *Bruce* v. *Davenport*, 3 Keyes, 472.)

There was, therefore, no error at the trial term in directing a verdict for the defendants. The essential facts upon which the defense existed were not in dispute. Our conclusion, therefore, is that it appears upon the undisputed evidence that the contract of August 13, 1881, was based upon a sufficient consideration, and that if it was obtained by duress it was subsequently ratified and confirmed.

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

128 93
141 535
128 93
143 258

In the Matter of the Application of the SOUTHERN BOULEVARD RAILROAD COMPANY to Acquire the Right to Construct, etc.

Upon an appeal from an order of Special Term confirming an award of commissioners appointed to appraise lands taken by a railroad company, the General Term reversed the order of Special Term and ordered a new appraisal before the same commissioners. *Held*, that the order being one in a special proceeding and not final, was not appealable to this court. (Code Civ. Pro. § 190, subd. 3.)

It appeared that the land taken was part of a highway known as the "southern boulevard," laid out under the act of 1867 (Chap. 290, Laws of 1867), which provides (§ 24) that no rails shall be laid in said boulevard except for the purpose of crossing it, and that if the legislature thereafter authorize the building of a railroad along it, nothing in said act shall be construed to affect or cut off the rights of the owners of the lands taken for the boulevard from claiming and receiving the full value of the lands taken for the road, to the same extent as if no boulevard had been laid out. The petitioner claimed that the provision as to damages was repealed by the amendment of said act in 1887 (Chap. 723, Laws of 1887). A merely nominal award was rendered to the land owners by the commissioners appointed to appraise damages; the General Term reversed the order confirming said award upon the ground that the legislature could not take away the rights reserved to the property owners under the act of 1867, without compensation. *Held*, that the order appealed from did not come within the provision of the Code

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of Civil Procedure (§ 190, subd. 2), making, in certain contingencies, an order adjudging a statutory provision of the state unconstitutional, appealable to this court; that said provision relates only to orders in an action affecting a substantial right, and not resting in discretion.

The provision of the Code of Civil Procedure (§ 1361), which declares that appeals from determinations in special proceedings are governed by the provisions of said Code, and the general rules of practice relating to "an appeal in an action, except as otherwise specially prescribed by law," applies to appeals to the General Term of the Supreme, or of a superior city court, not to appeals to this court.

Where the General Term has power to hear and decide an appeal from an order, the order it makes is within its jurisdiction, even though an erroneous reason be given for its exercise.

(Argued June 4, 1891; decided June 16, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 26, 1891, which reversed an order of Special Term confirming the report of commissioners appointed to appraise damages, vacated the same and directed a new appraisal.

The facts, so far as material, are stated in the opinion.

John N. Lewis for appellant. This appeal is expressly authorized by the Code. (Code Civ. Pro. §§ 190, 1361; *Goodell* v. *Jackson*, 20 Johns. 693–721; *Betsinger* v. *Chapman*, 88 N. Y. 487–495; *People* v. *Bell*, 4 N. Y. Supp. 869, 870; *State* v. *Stockley*, 45 Ohio St. 304–308; *In re P. P. & C. I. R. R. Co.*, 85 N. Y. 497, 498; *In re N. Y., W. S. & B. R. R. Co.*, 94 id. 287–291.) An appeal from this order to this court will lie for the reason that the General Term reversed the order confirming the report and appraisement, upon a ground which they were without power to consider. (*In re U. L. R. R. Co.*, 112 N. Y. 61; *H. R. T. Co.* v. *W. T. & R. Co.*, 121 id. 897; *Ziegler* v. *Chapin*, 43 Alb. L. J. 398.) The statute of 1887 (Chap. 723) is a constitutional and valid exercise of legislative power. (*Louisiana* v. *Mayor, etc.*, 109 U. S. 285; *Chase* v. *Curtis*, 113 id. 452; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Fletcher* v. *Peck*, 6 Cranch. 87; *Garrison* v. *City of New York*, 21 Wall. 196. It

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cannot be held that by virtue of the consummation of proceedings for condemnation and the opening of the boulevard, under the original statute, vested or contracted rights, of the nature contended for, were acquired. (Chitty on Cont. 87; *Freeland* v. *Williams*, 131 U. S. 405; *Nelson* v. *Parish*, 111 id. 716; *People* v. *French*, 1 Abb. [N. C.] 419; Cooley on Const. Lim. 358.) The opinion of the General Term is not based upon sound principles. (Redf. on Railways [5th ed.], § 17; Wood on Railways, § 5; Beach on Railways, § 23; *Spofford* v. *S. B. R. R. Co.*, 4 N. Y. Supp. 388.) The contract which the General Term evolves from the act of 1867, is one which the legislature has no power to make. (Const. N. Y. art. 1, § 7.) The right of eminent domain is an inherent attribute of sovereignty. Constitutional provisions do not confer the right, although they generally surround its exercise with safeguards to prevent abuse. (Cooley on Const. Lim. 356, 357, 386; *Kohl* v. *United States*, 91 U. S. 367, 371; *Searl* v. *School District*, 133 id. 553; *People* v. *Kerr*, 27 N. Y. 211.) If it be held that the provisions of the statute of 1867, are, in any sense, a contract which the legislature had power to make, then we respectfully submit that it is a limited and conditional contract, dependent upon a contingency which has never arisen; and which, by reason of the amendment to the Constitution in 1875, can never arise. (Const. N. Y. art. 3, § 18; *Tucker* v. *Ferguson*, 32 Wall. 527; *H. B. M. & F. R. Co.* v. *S. B., etc., Co.*, 41 Hun, 553.)

Wm. Pierrepont Williams for respondents. The order appealed from is not reviewable by the Court of Appeals. (Laws of 1884, chap. 252, § 1; Laws of 1850, chap. 140, § 18; Laws of 1876, chap. 198; *In re D. & H. C. Co.*, 69 N. Y. 209; *N. Y. C. R. R. Co.* v. *Marvin*, 11 id. 276; *In re N. Y., W. S. & B. R. R. Co.*, 94 id. 287; *Crosby* v. *Stephen*, 97 id. 606; Code Civ. Pro. § 1300; *Bergen* v. *Carman*, 79 N. Y. 151.) It was competent for the legislature by the act of 1867, under which the southern boulevard was laid out, to prescribe a measure of damages (upon a future con-

demnation by a railway company) more favorable to the property owners than would have prevailed at common law. (*In re T. F. S. R. R. Co.*, 102 N. Y. 343; Lewis on Eminent Domain, § 373.) The act under which the southern boulevard was laid out, provided in substance that in the event of any rail or tramway being thereafter authorized upon it the owners of the roadbed should be compensated precisely as if the highway had not been imposed. (4 N. Y. Supp. 390.) When the condemnation under the act of 1867 had been effected, the provision for a special measure of compensation (upon a future condemnation by a railway company) became a contract between the state and the parties whose land was made servient to the highway. (*Lahr* v. *M. E. R. R. Co.*, 104 N. Y. 291; *Vandermulen* v. *Vandermulen*, 108 id. 201; *Story* v. *N. Y. E. R. R. Co.*, 90 id. 172.) The amendment to chapter 290 of the Laws of 1867 was unconstitutional and a nullity so far as it purported to change the measure of compensation established by that act, and in departing from that measure the commissioners committed an error that was fatal to their report. (Const. U. S. art. 1, § 10; Const. N. Y. art. 1, § 6; *Stephens* v. *Marshall*, 3 Chand. 229; *B. C. R. R. Co.* v. *B. C. R. R. Co.*, 32 Barb. 364.) If appellant could now raise the question that the award of costs was improper, the point should be decided against it. (Code Civ. Pro. § 3240; *In re N. Y., W. S. & B. R. R. Co.*, 94 N. Y. 294.)

PECKHAM, J. The railroad company desire to acquire the right to build a street surface railroad in and upon the Southern boulevard in the city of New York. This boulevard was laid out and opened through the land of private owners under and by virtue of an act of the legislature passed in 1867 (Chap. 290).

Section 24 of that act prohibited the laying of any rails in the boulevard except for the purpose of crossing it, and provided that if the legislature should thereafter authorize the building of a railroad along the boulevard nothing in the act of 1867 should be construed to affect or cut off the rights of the owners of the lands taken for the boulevard from claiming

and receiving the full value of all the land taken from the owners for the road thus to be authorized, to the same extent as if no boulevard had ever been laid out there.

In 1884 (Chap. 252), the legislature passed the General Street Surface Railroad Act and under it the Southern Boulevard Railroad Company has been organized. In 1887 (Chap. 723, Laws of 1887), the legislature amended the twenty-fourth section of the act of 1867, under which amendment the above-named railroad company claims the right to build its road in the Southern boulevard. It applied by petition to the Supreme Court for the appointment of commissioners to appraise the value of the lands taken by the company. Among the owners of lands in the boulevard, which had been taken under the act of 1867 for the purposes of that boulevard only, were the executors of Mr. Spoffard, officially and individually. The commissioners were appointed to take evidence as to the value of the land of the executors, etc., and gave a merely nominal award, apparently, as is said by the learned judge who delivered the opinion at the General Term, basing their award upon the provisions of section 24, as amended in 1887, and thus enabling the railroad company to acquire its interest in such lands for nothing. The award was confirmed at Special Term, but upon appeal to the General Term that court reversed the order confirming the award and ordered a new appraisal before the same commissioners, basing its order upon the ground that the legislature could not take away the rights of the property owners left in them under the act of 1867 without compensation. Instead of going back before the commissioners and taking the new hearing, as provided for by the order of the General Term, the counsel for the railroad company has appealed here and claims the right to be now heard upon the merits of his appeal.

The order is clearly not appealable.

This is a special proceeding, and the only authority for an appeal to this court is to be found in subdivision 3 of section 190 of the Code. By that subdivision the order must be a final one before an appeal can be taken from it to this court. There can be no question that the order appealed from herein

is not of that description. It simply reverses the former and orders a new appraisal.

The orders mentioned in subdivision 2 of section 190 are orders made in an action and affecting a substantial right, and not resting in discretion. Under clause 6 of that subdivision, if the order adjudges a statutory provision of the state unconstitutional, an appeal may in certain contingencies be taken from the order to this court. This order is not included in that subdivision. Section 1361 of the Code of Civil Procedure, cited by counsel, applies to appeals to the General Term of the Supreme Court or to a Superior City Court, and has no application to appeals to this court.

By section 11 of the old Code (subd. 4), whenever a decision of any motion at Special Term was placed upon the ground of the unconstitutionality of any law of this state, an appeal could be taken from the order to the General Term and to the Court of Appeals. If it be assumed that under such subdivision in the old Code an appeal would lie to this court if the order were not final, provided it held a state law unconstitutional, the adoption of the new Code has altered that provision, and the order in a special proceeding, to be now appealable to this court, must be a final one.

This question has already been decided in *Matter of Petition, etc.* (98 N. Y. 12).

The order is not rendered appealable because, as claimed by the counsel for the railroad company, the General Term reversed the report and appraisement of the commissioners upon a ground which they were without power to consider. We see no reason for saying that the General Term had no power to consider the question whether the commissioners had not proceeded upon a wholly erroneous theory as to the law governing their appraisal in the case, and if the commissioners thought the act of 1887 permitted them to award nothing for the lands taken and they decided accordingly, we are not aware of any estoppel upon the land owners or the court which, upon appeal from the order confirming the report, would prevent the one from raising and the other from deciding the question

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as to the validity of an act which provided for such an appraisal. And again: The court had power to hear and decide an appeal from the order confirming the report, and having such power, the order which it makes is within its jurisdiction even though an erroneous reason be given for its exercise. When the order which it, in fact makes is not a final one, we cannot review such order where the court exercises the jurisdiction granted to it by the Code.

The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

128	99
155	592
128	99
170	[1]279
171	[2]129

JOHN H. SPRINGER, Respondent, *v.* JULIUS BIEN et al., Appellants.

Neither the verdict of a jury nor the findings of a court in a prior action upon the precise point involved in a subsequent action between the same parties constitute a bar, unless followed by a judgment based thereon, or into which the verdict or findings entered; the judgment is the bar, not the preliminary determination of the court or jury.

So also, although a judgment has been entered in a prior action, it does not prevent the re-litigation of a fact litigated and found in such action, which was wholly irrelevant to the issues therein, and did not enter into and was not involved in the final judgment.

In an action upon a contract, under which plaintiff claimed he was employed by defendants to procure orders for their work and was to receive as compensation a percentage of all the moneys realized from orders so procured, an accounting was asked for of all moneys received subsequent to a certain date on orders obtained by plaintiff prior to leaving defendants' employ, but upon which moneys were not realized until afterwards. Defendants did not specifically deny such contract, but set up as a bar a judgment in a former action brought by them against this plaintiff and others to restrain them from using in the business of a corporation organized by him and such others after he had left defendants' employ, a name, which they claimed to be their trade-mark, and to the use of which they were exclusively entitled. Upon the trial thereof evidence was given and a finding thereon made to the effect that the ten per cent commission was only to be paid on moneys received on orders placed by the plaintiff herein during his employment. A judgment was entered in favor of the plaintiffs in that action, among other things, enjoining the defendants therein from using said name and also requiring them to account to said plaintiffs for all property which they

Opinion of the Court, per ANDREWS, J.

had obtained as the agent of said plaintiffs in the name of said company, and a referee was appointed to take and state the account. The defendants here claimed that the judgment in the prior action was a bar. *Held*, untenable; that even if the evidence in the prior action warranted a finding such as was claimed to have been made, such finding was wholly irrelevant to the issues and did not enter into and was not involved in the final judgment therein.

(Argued June 5, 1891; decided June 16, 1891.)

APPEAL from order of the General Term of the Court of Common Pleas of the city and county of New York, made November 10, 1890, which denied a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

George F. Danforth for appellants. The matter now in suit is *res adjudicata*. (*Griffin* v. *L. I. R. R. Co.*, 102 N. Y. 449; *Pray* v. *Hegeman*, 89 id. 351.) The omission of the plaintiff in the first action to state fully the time during which compensation should be payable to Springer and the admission in the answer of the partial statement actually made is unimportant. (*Cowing* v. *Altman*, 79 N. Y. 167; *Teall* v. *E. L. Co.*, 119 id. 654.)

John W. Boothby for respondent. The judgment in the Supreme Court action is no bar to the plaintiff's claim here, and is not *res adjudicata* as against the plaintiff upon the question as to what his agreement was with Julius Bien & Company, so far as it affects this action. (*Campbell* v. *Consalus*, 25 N. Y. 613; *People* v. *Johnson*, 38 id. 63; *Stannard* v. *Hubbell*, 123 id. 520.)

ANDREWS, J. The sole point relates to the effect of the judgment in the former action of the present defendants against the present plaintiff and others, as *res adjudicata* upon the question involved in this action.

This action is based upon an alleged employment of the plaintiff by the defendants under a contract that he was to act as their agent in procuring orders for their work, and was to receive as compensation ten per cent on all money realized by

their firm from orders so procured. The relief demanded was an accounting by the defendants of moneys received by them subsequent to March 4, 1889, on orders obtained by the plaintiff before he left their employment, but upon which the moneys were not realized until after that time.

The defendants in their answer do not deny specifically the contract alleged in the complaint, but set up among other defenses the judgment in the prior action as a bar to the claim in the present one.

The former action was brought to restrain the use by the defendants therein of the name of "The Central Lithographing and Engraving Company," in the business of a corporation organized under that name by Springer and others after Springer had left the employment of the defendants. The plaintiffs in that action claimed the name as their trade-mark and that they were exclusively entitled to its use. After issue joined the case was heard before a judge at Special Term, who after the evidence was closed, made findings of fact and law, upon which judgment was entered for the plaintiffs therein among other things enjoining the defendants from using the name of "The Central Lithographing and Engraving Company," and the judgment contained a further provision requiring the defendants and each of them to account to the plaintiffs for all contracts, letters or other property which may have been obtained by the defendant John H. Springer, as the agent of the plaintiffs in the name of "The Central Lithographing and Engraving Company," and for such purpose William J. Fanning was appointed referee to take and state the account. The claim is that this judgment is *res adjudicata* upon the claim for compensation upon which this action is brought. It is said that on the trial of the former action evidence was given as to the terms of the contract for compensation, from which it appeared that the ten per cent commission was only to be paid upon moneys received by the defendants on orders placed by Springer during his employment by Bien & Co., and that moneys received thereafter on orders procured by Springer, but which were unexecuted when his

employment ceased, were not subject to the commission. We are also referred to certain findings made by the trial judge in the former action, which, as claimed, sustain this construction of the contract. It is a sufficient answer to the claim of estoppel by the former judgment, that conceding that the evidence in that action warranted a finding that the present plaintiff was only to have commissions on money actually received during his employment, and that the findings bear the construction contended for, nevertheless, they were wholly irrelevant to the issues and did not enter into and were not involved in the final judgment. Neither the verdict of a jury nor the findings of a court in a prior action upon the precise point involved in a subsequent action between the same parties, constitute a bar unless followed by judgment based thereon, or into which the verdict or finding entered. It is the judgment which constitutes the bar and not the preliminary determination of the court or jury. So also, and for obvious reasons, although judgment has been entered, the judgment does not prevent the re-litigation of any irrelevant fact, although it may have been litigated and found in the prior action. (*Webb* v. *Buckelew*, 82 N. Y. 555; *Stannard* v. *Hubbell*, 123 id. 528.) The question whether the contract for compensation included commissions on all orders procured by the plaintiff during his employment, upon which moneys should be realized by the defendants at any time, or only on orders procured, upon which money was realized during the employment, was immaterial to the judgment and relief granted in the former action. The accounting provided by the judgment did not embrace the matter of compensation and that question was still open, notwithstanding the judgment, to subsequent controversy. The claim now made is not inconsistent with any matter adjudged in the former action, although it may have been covered by the evidence and embraced in the findings.

We think the judgment of *res adjudicata* was properly disposed of below and the order should, therefore, be affirmed.

All concur.

Order affirmed.

Statement of case.

SOLOMON REISS et al., Respondents, *v.* THE NEW YORK STEAM COMPANY, Appellant.

In an action to recover damages for injuries to plaintiffs' goods, caused by steam which escaped from certain apparatus, which defendant, a corporation engaged in furnishing steam for the purposes of heat and motive power, had put into the premises occupied by plaintiffs, under a contract with them, it appeared that after the apparatus had been tested in the usual manner and found to be apparently safe and adequate, the premises were closed from Saturday night until Tuesday morning; that shortly after they were opened the bonnet on the service valve in one of the pipes in the basement was blown off and the steam escaped, doing the injuries complained of. It was proved that no similar accident had happened in defendant's business, that defendant used the best material, purchased of manufacturers of high repute, and employed competent and skilled workmen, and there was no evidence of any visible defect or that the work was not well done. *Held*, that the refusal to nonsuit was error; that the burden was upon the plaintiffs to show that defendant failed to use the degree of care which ordinary prudence and foresight would, under the circumstances, suggest; that the mere fact that the bonnet blew out did not furnish sufficient evidence of negligence.

(Argued June 5, 1891; decided June 16, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 7, 1891, which modified, and affirmed as modified, a judgment in favor of plaintiffs entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

James W. Hawes for appellant. The burden of proving defendant's negligence is on the plaintiffs. (*Holbrook* v. *N. & S. R. R. Co.*, 12 N. Y. 236; *Whitworth* v. *E. R. Co.*, 87 id. 413; *Desmond* v. *Rose*, 14 J. & S. 569; *Cordell* v. *N. Y. C. & H. R. R. R. Co.*, 75 N. Y. 330; *Hart* v. *H. R. B. Co.*, 84 id. 56; *Riceman* v. *Havemeyer*, Id. 647; *Hayes* v. *F. S. S., etc., R. R. Co.*, 97 id. 259; *Crafts* v. *Boston*, 109 Mass. 519; *Wilson* v. *N. Y. C. & H. R. R. R. Co.*, 97 id. 87; *Baulec* v. *N. Y. & H. R. R. Co.*, 59 id. 356, 366; *Dwight*

Opinion of the Court, per EARL, J.

v. *G. L. Ins. Co.*, 103 id. 341, 358; *Daniels* v. *Potter*, 4 C. & P. 262; *Hunt* v. *L. G. L. Co.*, 1 Allen, 343; *Cosulich* v. *S. O. Co.*, 122 N. Y. 118; *Wiedneer* v. *N. Y. E. R. R. Co.*, 114 id. 462.) The instructions and explanations to Hogan should have been admitted. (Smith on Master and Servant [4th ed.], 358; *Burgess* v. *Gray*, 1 C. B. 578, 590; *McLaughlin* v. *Prior*, 4 M. & G. 48, 59.) The witness Gaines, an expert of practical experience, should have been allowed to state what, in his opinion, caused the accident. (*Turner* v. *Newburgh*, 109 N. Y. 301; *People* v. *Wilson*, Id. 345; *Fort* v. *Brown*, 46 Barb. 366; *Clark* v. *Willett*, 35 Cal. 534; *F. W. & D. C. R. Co.* v. *Thompson*, 75 Tex. 501; *Detwieler* v. *Groff*, 10 Penn. St. 376; *Buffinn* v. *Harris*, 5 R. I. 243; *Transportation Line* v. *Hope*, 95 U. S. 297.) The jury was instructed that if any one of the negligences imputed in the complaint occurred they must find for the plaintiffs, which is, in effect, saying that they would be justified in finding that any one of the imputed negligences existed as a fact. This was error. (*Booth* v. *B. & A. R. R. Co.*, 67 N. Y. 593; *Greene* v. *White*, 37 id. 405.) The jury should have been instructed that the defendant was not responsible for the actions of the trustees. (Meachem on Agency, §§ 732, 734, 737, 738; *Stevens* v. *Woodward*, L. R. [6 Q. B. Div.] 318; *Cavanagh* v. *Dinsmore*, 12 Hun, 465; *Sheridan* v. *Charlick*, 4 Daly, 338; *Stone* v. *Hills*, 45 Conn. 44; *Mitchell* v. *Crassweller*, L. R. [13 C. B.] 237; *Campbell* v. *Providence*, 9 R. I. 262.)

Stern & Kingsbury for respondents. The accident, and the damage caused thereby, resulted from defendant's negligence. (*Cosulich* v. *S. O. Co.*, 23 J. & S. 384; *Losee* v. *Buchanan*, 51 N. Y. 476.)

EARL, J. This action was brought to recover damages to goods in the basement of a store occupied by the plaintiffs in the city of New York caused by steam. The defendant was a corporation whose business it was to furnish steam in the

city of New York for the purposes of heat and motive power, and the plaintiffs desiring steam for the running of the elevator in their store and for heating purposes, made a contract with the defendant for a supply of steam by means of a connection in their basement with defendant's mains or pipes under the street, and a system of pipes, valves and meters set up by it in the basement. Its mechanics put in and adjusted the apparatus in the latter part of June, 1887, and had finished it on Saturday, July second. At the same time, the landlord of the store occupied by the plaintiffs as lessees employed one Maslin to put pipes in the building connected with defendant's apparatus in the basement to furnish power for an engine on the top floor, and to put heat registers in the building. On the second of July, the pipes of Maslin were connected with the defendant's apparatus in the basement, and at the request of the plaintiffs, its mechanics turned on the steam and caused it to pass into the plaintiffs' store through the defendant's pipes and apparatus. It was turned on then solely to test the connections and try the engine on the top floor. The defendant's mechanics carefully inspected the valves, connections and pipes, and found that the work appeared to be well done and to be safe and adequate. After the work had been sufficiently tested, the mechanics of the defendant left the store, and it remained closed on Sunday and Monday and was not opened until about eight o'clock on Tuesday morning. Soon thereafter the bonnet on the service valve in one of the defendant's pipes nearest the street in the basement was blown off, and steam escaped into the basement doing the damage to the plaintiffs' goods of which they complain in this action.

The claim of the plaintiffs is that the accident was due to carelessness on the part of the defendant.

We have carefully examined the record and have been wholly unable to find therein any evidence whatever sufficient to show that the accident was the result of any culpable carelessness chargeable to the defendant. It is not needful now to go over all the evidence and call attention to each part of it and show its bearing. It was proved that the defendant used

the best material purchased of manufacturers of high repute, and it does not appear that its agents had any reason to doubt that it was adequate and perfect, or that they had any reason to suppose that any degree of care on their part required them to subject it to any further tests, or that any further tests were customary or usual. The workmen employed by the defendant to put the apparatus in the plaintiffs' store and make the steam connections were competent and skilled mechanics, and there is no claim that it is chargeable with any negligence on account of the character of the mechanics whom it employed. There is no evidence showing that the work was not well done, as thoroughly and carefully as any skilled mechanics would have done it. The bonnet blew out from the valve, either from the pressure of steam, or the pressure and force of water made by the condensation of steam. The plaintiffs claim that it would not have blown out if it had been properly constructed, and that it blew out because the screw by which it was fastened into the valve was too small, and, therefore, that the threads of the screw did not hold it. If this was the defect, there is no proof that any ordinary care ought to have discovered it. The bonnet and the valve were made by competent manufacturers and had been properly tested by them, and the defendant had no reason to expect such an imperfection. When the steam was let on, the second day of July, the bonnet and valve proved adequate, and there was no indication from the examination then made of any imperfection or weakness therein, and they were able to stand the pressure to which they were subjected until the time of the explosion on the fifth day of July. One or two witnesses gave opinions that if the screw had been large enough it would not probably have blown out; but there is considerable other evidence from witnesses shown to be competent to speak upon the subject that, by the formation of what is called a water ram, the bonnet would have been pressed out even if the screw had been large enough to fit closely and compactly into the valve, and that the pressure would cause an expansion of the nut or

valve into which the screw passed, so that it could be blown out without injuring the thread. The accident was a very unusual one, which had never before happened in the business of the defendant, and it was not bound to anticipate or guard against it.

All that is left, therefore, of the plaintiffs' case is that the bonnet was blown out, and from that circumstance they claim that the jury were authorized to draw the inference of negligence. But there is no proof justifying such an inference, and whether or not the accident was the result of negligence must have been a mere guess. It is equally probable that it occurred in the manner claimed on the part of the defendant. Judging from the evidence given it is more probable that this bonnet was forced out by what is called a water ram than in any other way, and that the water ram was the result of accident occasioned because the apparatus had been tampered with by some one not in the defendant's employ and after the test had been made on the second day of July. The mere fact that there was this blowing out of the bonnet and the escape of steam, does not furnish sufficient evidence of negligence on the part of the defendant to cast liability upon it, and so we have several times held. (*Losee* v. *Buchanan*, 51 N. Y. 476; *Dobbins* v. *Brown*, 119 id. 188; *Cosulich* v. *Standard Oil Co.*, 122 id. 118.)

This steam apparatus was put into the plaintiffs' store for their benefit. The defendant did not insure or guarantee them against danger therefrom. It was bound only to use that degree of care which ordinary prudence and foresight would, under the circumstances, suggest and prompt. Whether or not it failed in such case could not be left to mere speculation. The burden was upon them to establish such failure by proof, and this burden they were bound to sustain, however onerous and difficult it proved to be.

The judgment should, therefore, be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

Statement of case.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOHN MOST, Appellant.

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171 430

It seems that to uphold an indictment for an unlawful assembly under the Penal Code (§ 451, subd. 3), it must be proved that three or more persons being assembled, united in attempting or threatening an act "tending towards a breach of the peace or an injury to person or property, or any unlawful act." A threat made by one or two persons only, although in an assembly of many persons, would not be indictable.

It need not affirmatively appear, however, that other persons present when the threat was made uttered or repeated the same words; participation in the threat may be shown by the adoption by others of the language used, exhibited by their conduct.

It is competent for the legislative power to create new offenses, and it may also extend common-law definitions of particular offenses, so as to include acts not punishable under and not embraced within the common-law definition.

Identity, therefore, in the name of offenses at common law and under a statute does not necessarily imply that the same precise constituents and no others enter into both.

Threats of personal violence made in an assembly in this state against residents of another state are within the statute. The legislature may properly pass laws to punish plotters in this state against the public peace of a sister state.

So, also, threats relating to acts not presently to be done, but to be performed at some future time, are within the statute.

M. was indicted under the Penal Code for participating in an unlawful assembly. The meeting in question took place the day before the hanging of the Chicago anarchists. It was attended by from eighty to one hundred people, mostly anarchists, in sympathy with M., who openly avowed himself to be one. When he entered, the persons present hailed him as their leader, and when he denounced the authorities as the murderers of their "friends and comrades" and threatened revenge, they applauded and cheered him. *Held*, that there was sufficient evidence of the requisite concurrence of the statutory number to go to the jury.

M., in his speech, denounced the government, the officers of the law and the judges concerned in the trial, advised his hearers to arm and be prepared for the revolution "not far distant," and declared that they would avenge the blood of their comrades, and declared that the governor of Illinois would not be "spared" in the general destruction. He referred to the "police bloodhounds," and exclaimed, "God help them if they are found in our socials." The audience exhibited by their cheers and appearance warm approval of these sentiments, and when the speaker

Statement of case.

said the day of revolution was "not far distant" one of them said excitedly: "Why not to-night, for we are ready and prepared." *Held*, that the evidence was sufficient to warrant a finding by the jury that these utterances were used and understood as threats; and that such a finding was conclusive upon this court.

This court cannot review an exercise of the discretion of the General Term in granting or refusing a new trial in a criminal case.

(Argued June 8, 1891; decided June 16, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 24, 1890, which affirmed a judgment of the Court of General Sessions of the Peace, entered upon the verdict of a jury, convicting him of a violation of subdivision 3 of section 451 of the Penal Code, which reads as follows: "Whenever any three or more persons, being assembled, attempt or threaten any act tending towards a breach of the peace, or injury to person or property, or any unlawful act, such an assembly is unlawful and every person participating therein by his presence, aid or instigation, is guilty of a misdemeanor."

The crime charged was predicated upon the proceedings of a meeting of anarchists held at a hall in rear of a saloon in East Seventh street in the city of New York, on the evening of the 12th of November, 1887, the day after Spies and others had been hanged in Chicago for the murder, by means of dynamite bombs and explosives, of a number of policemen. The meeting was addressed by the defendant. The evidence on the part of the prosecution of his utterances on that occasion is found in the testimony of two policemen, who were assigned by their superior officer to attend the meeting, and of a newspaper reporter who was also present. Their version of the speech was flatly contradicted by the defendant and ten or more witnesses called by him.

The witnesses for the people varied somewhat in their narration of the occurrences on the evening in question, but they substantially agreed in regard to the most material points. It appears from the testimony that a similar meeting appointed to

be held on the same evening, had been suppressed by the police authorities. There were present at the meeting addressed by Most, from eighty to one hundred people, who were, in the main, anarchists, and the defendant openly avowed himself to be one. When he came into the hall he was greeted by the assembly with the words: "Here comes our leader, Father Most." He soon commenced speaking and the following are among his utterances, as testified to by witnesses for the people: "Brother anarchists, we were to have a meeting in Second avenue in Florence Hall, over our dead brethren, who were murdered in Chicago." "I have just received word that Captain McCullagh and his bloodhounds of police have stopped our meeting." "Let them beware; hereafter our meetings will be held in secret, and God help them if we catch them in our socials." "It was a shame, and that the police spies — the police hounds and the capitalistic press, their teeth were filed, were sharp, but that they would be blunted."

The speaker then went on to extol the bravery of their brethern who had died on the gallows at Chicago. He also said: "They were not properly hung; the weight was not heavy enough to break their necks, but their blood cries to heaven for revenge and we will revenge them."

"Our brethen in Chicago had not a fair trial; there was perjured evidence; there were capitalists on the jury; they held our brethern in prison until they could get perjured evidence to convict them."

"If I had known the executioner who murdered, who strangled our brothers, I would never rest until he had shared their fate."

"The day of revolution will soon come. First of all will be Grinnell; then comes Judge Gary; then the Supreme Court of Illinois; then the highest murderers of the land, the Supreme Court of the United States. The most cowardly of all Oglesby, the governor of Illinois. He must not think because he pardoned two of our brethern to a lingering death of life imprisonment, he will be spared."

Statement of case.

"I again urge you to arm yourself, as the day of revolution is not far off; and when it comes, see that you are ready to resist and kill those hirelings of capitalists."

"What do we care for a few soldiers? We have a weapon a hundredfold worse than theirs. They think they kill five of our brethern, but we will have a hundred or five hundred for every one they have murdered." "I am an anarchist, and am willing to die for its cause."

And according to one of the witnesses he ended his harrangue with the exclamation: "Rise Anarchy! Long shall it live!"

Grinnell referred to was the prosecuting officer who conducted the prosecution of the Chicago anarchists; Gary was the judge who presided at the trial and sentenced them. The Supreme Court judges of the state of Illinois were the judges who had affirmed their conviction and sentence. The judges of the Supreme Court of the United States had denied their application for writs of error and supersedeas. Oglesby was the governor of the state of Illinois, who had commuted the sentence of two of the convicted anarchists and had refused pardon and commutation to five others.

At times during the course of the address the audience exhibited by their cheers and appearance great excitement and warm approval of the sentiments he expressed, and when the speaker said: "The day of revolution is not far distant," one of the audience rose and said excitedly: "Why not to-night, for we are ready and prepared?"

During the course of the trial the district attorney sought, by offers of evidence (repeatedly made and overruled), to get before the jury the fact that the defendant was the author of a book entitled "A Manual of Revolution Warfare," and the offers made embraced references to the contents. The conduct of the district attorney is criticized by the defendant's counsel as unfair and was made a point on the application made to the trial judge for a new trial, which he denied.

It was claimed the evidence did not make out the offense charged in the indictment.

Opinion of the Court, per ANDREWS, J.

William F. Howe for appellant. The alleged threats being against persons not residents, our Penal Code has no extra territorial effect, and, therefore, such threats could not constitute a violation of our statute. (*People* v. *Mosher*, 2 Park. 195; *W. T. & C. Co.* v. *Kilderhouse*, 87 N. Y. 430; *Ormes* v. *Dauchy*, 82 id. 443; *People* v. *Merrill*, 2 Park. 590.) The court erred in permitting the district attorney to interrogate each witness for the defense as to his religious belief, and in not stopping the district attorney in his summing up to the jury when he said that the jury should not believe the defendant and his witnesses, because some of them testified that they did not believe in the Supreme Being. (Const. of N. Y. art. 1, § 3.)

McKenzie Semple, Assistant District Attorney, for respondent.

ANDREWS, J. But three of the questions presented on the brief of the appellant's counsel can be considered on this appeal. One of these questions is raised by the exception to the denial by the trial judge of the motion of the counsel for the defendant, made at the conclusion of the evidence on the part of the people, for an instruction to the jury to acquit the defendant on the ground that the evidence was legally insufficient to justify a conviction. An exception was taken to a question put to a witness for the defendant on cross-examination by the prosecuting officer, and which was allowed by the court, as to his belief in a Supreme Being. A third exception was taken to evidence offered by the prosecution and admitted, that the persons present at the meeting at Kramer's Hall on the evening of November 12, 1887, were anarchists.

By the decision of the General Term, affirming the conviction and judgment of the trial court, questions as to the credibility of witnesses and the weight and preponderance of evidence are eliminated from the controversy, as well as every consideration bearing upon the propriety of granting a new

trial in the exercise of judicial discretion, upon the ground that the jury were prejudiced by offers of evidence persistently made by the prosecuting officer, and repeatedly overruled, which offers, as is claimed, were persisted in in order to bring before the jury irrelevant facts having no legitimate bearing upon the issue to be decided. If, in the opinion of the General Term, for any reason appearing in the record, justice required a new trial, it had the power in its discretion to grant it. But this court, as a general rule, deals with questions of law only, and it cannot review an exercise of the discretion of the General Term in granting or refusing new trials in criminal cases.

The main question relates to the sufficiency of the evidence to support the charge in the indictment. In order to ascertain in what the offense of an unlawful assembly consists, reference must be had primarily to the statute which defines it. It was an offense well known at common law, and common-law definitions are a material aid in many cases in the interpretation of statute definitions of common-law offenses. But as it is competent for the law-making power to create new offenses not before known, so it may extend common-law definitions of particular offenses so as to include acts not punishable under the common law and not embraced within the common-law definitions of the offense. In other words, identity in the name of offenses at common law and under a statute, does not necessarily imply that the same, precise constituents, and no others, enter into each.

The third subdivision of section 451 of the Penal Code, under which the defendant was indicted, requires that in order to constitute the offense of unlawful assembly, three or more persons being assembled, should attempt or threaten any act "tending towards a breach of the peace, or an injury to person or property, or any unlawful act." The offense can only be committed when there is a concert or combination of three or more persons who unite in the attempt or in the threat to do one or more of the things specified in the statute. A threat made by one or by two persons only, in which no others par-

ticipated, would not be indictable under this statute, although made in an assembly of many persons. It was also the rule of the common law that three or more persons should be assembled and participate in the unlawful purpose, in order to constitute the offense of unlawful assembly, or the cognate offenses of rout and riot. (4 Bl. Com. 146; 1 Russ. on Cr. 288.)

Unless, therefore, the jury were authorized to find that the threat charged in the indictment was made not only by the defendant Most, but also at least by two other persons, on the occasion in question, the offense was not made out. In determining whether others participated with Most in the threat alleged, it was not necessary that it should affirmatively appear that other persons present uttered or repeated the same words used by Most. Their participation could be shown by an adoption of his language, exhibited by their conduct. If the jury were authorized to find that the persons present were under the influence of similar sentiments, and that they (to the number of two or more) adopted his language as their own, then the threats, although only uttered by him in words, were also those of the persons who by their conduct united in and assented to them. "If any person," said MANSFIELD, Ch. J., in *Clifford* v. *Brandon* (2 Camp. 370), "encourages, promotes or takes part in riots, whether by words, signs or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter." Within this principle the requisite concurrence of the statutory number in the threats uttered by Most was shown, or at least there was sufficient evidence of that fact to go to the jury. The assembly had met under the excitement of the hanging of the Chicago anarchists the day before. It was in sympathy with Most, and when he entered the room the persons present hailed him as their leader. They applauded his utterances and cheered him when he denounced the murderers of their "friends and comrades," and threatened revenge. But it is insisted that no threats were proved to have been made by Most, that what he said were prophecies of what would be likely to happen, and not threats that he or others in sympathy with him would commit

violence or murder to vindicate their "murdered brethern." It is unnecessary to recall the specific evidence upon this point. The language of Most would, under ordinary circumstances, be regarded as the ravings of a madman rather than the deliberate utterances of one who had formed the purpose of avenging supposed wrongs by murder and revolution. It was for the jury, however, to interpret the language used. The denunciations of the government and the officers of the law, with which Most's speech abounded, his advice to arm and to be prepared for the revolution "not far distant;" his declaration that they would avenge the blood of their comrades; his references to the judges and the officials who were concerned in their trial, conviction and execution, and the declaration that Governor Oglesby, although he had commuted the sentences of two of the condemned, would not be "spared" in the general destruction; his reference to the "police bloodhounds," and his exclamation, "God help them if they are found in our socials," presented evidence from which the jury had a right to say whether or not words, some of which were unmistakably in the form of threats, were in fact used and understood as such, and their finding upon this point adversely to the defendant is conclusive here.

Nor is it, we conceive, an answer to the indictment that the threats related to acts not presently to be done, but to be performed at some future time, when affairs were ripe for the revolution predicted. The main purpose of the common law and of the statute relating to unlawful assemblies, is the protection of the public peace. Incendiary speeches under the circumstances disclosed in this case, before a crowd of ignorant, misguided men, are not less dangerous because the advice to arm for the redress of grievances, and the threats of murder, are accompanied with the suggestion that the time is not quite come for action. This is illustrated in this case by the circumstance appearing in evidence. When Most said, "The day of revolution is not far distant," one of the audience rose and said excitedly, "Why not to-night? We are ready and prepared." No one can foresee the consequences which may

result from language such as was used on this occasion, when addressed to a sympathizing and highly excited audience.

The point that threats of personal violence made in this state against persons in another state, although made at an assembly here, are not within the statute, is untenable. The offense of an unlawful assembly of which the defendant was convicted was committed here. We are administering our own laws and not the laws of a foreign jurisdiction, and our state may properly pass laws to punish plotters here against the public peace of a sister state. We are of opinion on the main question that a case within the statute was made out for the jury. The common-law offense of unlawful assembly is defined to be "a disturbance of the peace by persons assembling together with an intention to do a thing which, if executed, would make them rioters, but neither executing it nor making a motion towards its execution." (1 Russ. on Cr. 275.) It is unnecessary to decide whether the circumstances of the present case constitute the offense within this definition. They bring the case within the statute definition, and that is sufficient.

The exception to the question put to the witness on cross-examination as to his belief in a Supreme Being is frivolous.

The exception to the proof that the persons assembled at the meeting of November twelve, were anarchists, is also without force. That they were in the main anarchists appears by other testimony. They were addressed by Most as "brother anarchists," and they saluted him as their leader. Moreover, proof that they were anarchists was competent to aid the jury in determining, in connection with other circumstances, the point whether the meeting joined in the threats made by the defendant.

We discover no error in the record, and the judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

Statement of case.

ALBERT EMMITT, Appellant and Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

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Plaintiff, having passed a civil service examination, received, on April 25, 1881, a written certificate of his appointment by the aqueduct commissioners of the city of New York, three of whom certified to his qualifications, as inspector of masonry upon the new aqueduct. Said certificate neither stated plaintiff's term of office, nor the salary to be paid; the salary was fixed at $120 per month. He was from time to time suspended, without charges being made against him or reasons assigned; while so suspended, he received no salary. During one of the periods of suspension, plaintiff entered into an agreement with the city that, while suspended, his pay should cease. This action was brought to recover salary for the periods of suspension. *Held*, that plaintiff was entitled to recover for those periods prior to the agreement but not for subsequent ones; that the office of inspector being one created by the act under which the said commissioners were acting (Chap. 490, Laws of 1883), the incumbent was not a simple employe or laborer, but an officer, and his compensation, when fixed, accompanied the office until he was removed or consented to a new rate of compensation; that while the term of office was at the pleasure of the commissioners, they could not effect arbitrarily, temporary or indefinite suspension without pay; but that it was competent for them to enter into an agreement with plaintiff in relation thereto, and the agreement made constituted a waiver of his right to the salary thereafter during suspension.

(Argued June 8, 1891; decided June 23, 1891.)

CROSS-APPEALS from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 4, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover salary alleged to be due the plaintiff as an inspector of masonry on the new aqueduct for the city of New York during several periods of suspension.

The following facts were proved upon the trial: Under chapter 490 of the Laws of 1883, the aqueduct commissioners, upon the 25th day of April, 1887, appointed, by a certificate in writing, the plaintiff an inspector of masonry upon the

Statement of case.

aqueduct, then in process of construction under said act. He was appointed upon recommendation of the board of civil service after competitive examination, and filed his oath of office. His salary was fixed at $120 per month. He commenced work under that appointment and continued to be employed until April 20, 1888, when he was suspended with no reason assigned therefor, and no notice given of any charge against him. He remained under suspension until June 6, 1888, when he was reinstated. He resumed work June 11, 1888, and continued employed until November 28, 1888, when he was again suspended and notice given him by letter. He remained under temporary suspension from November 28, 1888, until February 2, 1889. On February second, he resumed his duties and continued employed until July 1, 1889, when he was again suspended and remained under suspension until February 12, 1890, when he was discharged from the service. No salary was paid him during these periods of suspension. On the 23d day of January, 1889, and during one of the periods of suspension, plaintiff entered into an agreement with the city that, if suspended, his pay should cease from the time of such suspension subject to the direction of the aqueduct commissioners. It was conceded that the plaintiff was ready and willing to perform his duties during each of these periods of suspension, and had demanded payment for his services during these intervals. He was notified that no further payments would be made for periods of suspension when he made demand for his pay.

Both parties requested the court to direct a verdict in their favor. The court directed a verdict in favor of the plaintiff for $482.19, the amount of the salary not paid during suspensions prior to the signing of said agreement.

Both parties duly excepted to the court's refusal to direct a verdict as requested, and as well to the direction given by the court.

Lyman E. Warren for plaintiff. The contract of hiring was clear and certain and should only be terminated by

unqualified dismissal or other unequivocal act. (*Gregory* v. *Mayor, etc.*, 113 N. Y. 416; *Acker* v. *Mayor, etc.*, 27 Hun, 413; *McCoy* v. *Mayor, etc.*, 46 id. 268; *Mullen* v. *Mayor, etc.*, 34 N. Y. S. R. 913.) The admission of the agreement of January 23, 1889, was void, but conceding it, for the purposes of argument, to have been competent evidence, it could have in no manner affected the plaintiff's right to recover salary during the entire periods of suspension. (*People ex rel.* v. *Civil Service Bd.*, 41 Hun, 287; *Gregory* v. *Mayor, etc.*, 113 N. Y. 421.) The agreement of January 23, 1889, was absolutely void. (*People ex rel.* v. *Board of Police*, 75 N. Y. 38–42; *Kehn* v. *State*, 93 id. 291; *Mullen* v. *Mayor, etc.*, 34 N. Y. S. R. 913.)

D. J. Dean for defendants. The plaintiff's hiring was monthly. (*McMillan* v. *Vanderlip*, 12 Johns. 165; *Jennings* v. *Camp*, 13 id. 94; *Webb* v. *Duckingfield*, Id. 390; *Tucker* v. *P. & R. C. & I. Co.*, 53 Hun, 139; *Beach* v. *Mullen*, 34 N. J. L. 343; *Haney* v. *Caldwell*, 35 Ark. 156; *Wilson* v. *Taylor*, 8 Daly, 253.) The agreement entered into between the plaintiff and the aqueduct commissioners that he shall be paid only for the services actually rendered is binding. (*People ex rel.* v. *Board of Police*, 75 N. Y. 38; *Kene* v. *State*, 65 How. Pr. 488; 4 Am. & Eng. Ency. of Law, 190; 2 id. 705.)

GRAY, J. I can perceive no distinction in principle between the main legal question involved in this appeal and that which was passed upon in the case of *Gregory* v. *Mayor, etc.* (113 N. Y. 416). The right of the plaintiff to recover for the periods of time during which he was under suspension is not essentially different from the right of the plaintiff which we sustained in the other case. Here the plaintiff was appointed by the aqueduct commission an inspector of masonry and his employment in that capacity was evidenced by a written certificate of appointment. Neither the term of office, nor the compensation to be paid, was stated therein. As it was pro-

vided, in the act creating the commission, that the commissioners might appoint and fix the compensation of persons to supervise and inspect all work authorized by the act to be done, the effect of such an appointment was to make its duration dependent upon the good behavior of the appointee, or the pleasure of the commissioners. The office of inspector being one created by the act, when filled, the incumbent became more than a mere ordinary employe, or laborer, engaged by the commissioners. Besides, it appears that his candidacy for the office must have been fortified by a certificate from the civil service commission and his qualifications further certified to by at least three of the aqueduct commissioners. Such an employe upon the work cannot be classified, or regarded, as a temporary or occasional laborer. He fills an office with certain more or less important responsibilities attached to it, and he becomes entitled to receive the compensation as it was fixed by the commissioners, until they see fit to discharge him. That power, unquestionably, is inherently their's and that is not disputed; but where is to be found the power to suspend the incumbent of the office without pay? Nothing in the act, vesting the commissioners with powers, leads us to infer such a power as to suspend an officer without pay. The only discretion which we find existing, with respect to engineers, supervisors or inspectors, is as to when and where they shall be appointed and what shall be their compensation when appointed. The counsel for the city argues that the act creating the aqueduct board was designed for a special purpose and that when the work of supplying New York city with an increased supply of pure water is completed, the commissioners, and all holding office under them, became *functi officio.* He, therefore, finds, in such features, ground for distinguishing such a departmental body from the board of excise, which is a permanent department of the local government, and so, from the difference in the feature of permanency of the two commissions, and in the nature of the duties of the inspectors appointed under each, as affected by the character of the work they are engaged upon, he deduces the proposition that there is a necessity for infer-

ring the existence of a power in the aqueduct commissioners to suspend an inspector without pay. In that way he endeavors to avoid conflicting with the rule in the *Gregory* case. So far as his argument is based upon the difference in the creation, duration, or municipal relations of the two commissions, I fail to perceive its force; while the argument drawn from the nature of the duties and the character of the work, is sufficiently met by the suggestion that, being a matter concerning the compensation, it could have been arranged for at the time of the appointment. The commissioners had power to fix that to suit themselves; but they had to fix it and it could not be left to be dealt with arbitrarily. It was subject to change by the consent of the employee; but, when fixed, the compensation accompanied the office until the official was removed, or a new rate of compensation was consented to.

In *Gregory* v. *Mayor, etc.* (*supra*) the plaintiff was an inspector of excise and he sued to recover payment of his salary for the time he was suspended by a resolution of the commissioners of excise. The argument was that he was a mere employee; having no fixed term of employment and whom the commissioners in suspending, in fact, discharged. Notice of suspension, it was argued, was a discharge from duty and pay, until in their pleasure the board should re-employ him upon duty. The argument was unsuccessful and we held that the power to suspend could not be inferred from the power to remove; nor be deemed inherent; and that it could not be regarded as a lesser power comprised within the greater. It was considered that nothing in the circumstances of the case showed an inherent necessity for the inference of the existence of the power to suspend, from the grant of the power to remove. I admit the force of the suggestion of the learned counsel for the city that there might be occasions when the work would not require the active performance of the duties of such employes; but that would be a reason for regulating the method of their compensation by some agreement. The compensation was left wholly to be fixed by the commissioners and the rate and condition of payment could perfectly well

have been the subject of agreement between them and their appointee. In my opinion, therefore, as the office of inspector was one which the act empowered the commissioners to fill by appointment, the incumbent derived from his office the right to receive the emoluments belonging to it, until discharged; and that temporary, or indefinite, suspension without pay was not within the powers of the commissioners to effect arbitrarily. But, as the compensation was to be fixed by the commissioners, it was perfectly competent for them to agree with the plaintiff with respect to it. It is only when the salary of an official is fixed by the law that it is beyond the power of those by whom he has been employed to agree upon some other figure, or to affect it in any way. *People ex rel. Satterlee* v. *Police Board* (75 N. Y. 38), and *Kehn* v. *State* (93 id. 291), recognize that principle distinctly. Hence, though this plaintiff was entitled to recover the compensation fixed by the aqueduct board, while he remained in office, when he subsequently agreed that if suspended by the aqueduct commissioners his pay should cease from that time, subject to their direction, the agreement constituted a waiver on his part and was a regulation as to his compensation, which it was perfectly competent and lawful to agree upon and which thereafter regulated the amount and mode of payment of the compensation he would be entitled to while continuing in office.

These views lead to an affirmance of the order and judgment below; and, as both parties have appealed, it should be affirmed without costs to either party as against the other.

All concur.

Judgment affirmed.

Statement of case.

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JEROME B. WASS, Respondent, *v.* BENJAMIN F. STEPHENS, Appellant.

The word "wilfully" in the provision of the Penal Code (§ 639), delaring that "any person who wilfully or maliciously displaces, removes injures or destroys * * * a pipe or main for conducting water or gas * * * is punishable by imprisonment," means not simply a voluntary and intentional act, which is in fact wrongful, but one done with a wrongful purpose, with a design to injure another, or from mere wantonness or lawlessness.

In an action for malicious prosecution plaintiff's evidence showed these facts: Under a contract between defendant and the Brooklyn park commissioners for a supply of water to Prospect park, defendant's water-pipes were connected with certain mains belonging to the city, and under the control of the commissioners. By the contract the commissioners were authorized to terminate it and disconnect the pipes in case of failure of defendant to furnish water as agreed, on giving six months' previous notice. The commissioners caused a written notice to be served on defendant that they had annulled the contract because the defendant "had not performed the conditions" thereof, and were about to cut the connections. The next day, by written order given to plaintiff, who was in the employ of the commissioners, he was directed to disconnect the pipes; while engaged executing the order defendant protested and threatened to imprison him if he continued the work. He, however, completed it, doing the work in a proper manner and so as not unnecessarily to injure defendant's pipes. Defendant, who knew that plaintiff acted under the order of the commissioners, thereupon presented a verified complaint to a magistrate, under the Penal Code (§ 639), charging that plaintiff "did commit a misdemeanor by maliciously and wilfully cutting the water-main;" it did not disclose the relation of plaintiff to the commissioners or the circumstances under which he acted. Plaintiff was thereupon arrested and brought before a magistrate. Upon the proceeding being adjourned defendant insisted that plaintiff should be "locked up." The proceeding was terminated by plaintiff's discharge. *Held*, that the evidence authorized the submission of the questions of probable cause and malice to the jury; that when defendant applied for the warrant he was chargeable with knowledge that in obeying the direction of the park commissioners, plaintiff did not "maliciously and wilfully" disconnect the pipes as charged.

(Argued June 12, 1891; decided June 23, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, entered upon an order

Statement of case.

made July 3, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This was an action for malicious prosecution.

It appeared that defendant, who owned or had control of certain water-works, on May 5, 1885, entered into a contract with the park commissioners of the city of Brooklyn to supply water to Prospect park in said city, and defendant's pipes were connected with mains belonging to the city, which were under the control of said commissioners. Said contract provided that in case defendant failed to furnish water as agreed said commissioners might terminate the contract and disconnect the pipes after notice of six months. On November 27, 1886, they served upon defendant a notice, in writing, that the contract was annulled for the reason that he "had not performed the conditions," and that they intended to cut off connections with his pipes and cautioned him to protect them. Two days after said commissioners gave to plaintiff, who was the inspector of parks in Brooklyn, a written order to disconnect the pipes. While engaged in doing so he was remonstrated with by defendant, who threatened to "jug" him if he did not desist. He however continued and completed the work, doing it in a proper manner, and so as to cause no unnecessary injury to the defendant's pipes. Defendant, knowing that plaintiff was acting under the order of the park commissioners, who were his superior officers, presented to a magistrate a verified complaint, which did not disclose plaintiff's official relation to said commissioners or the circumstances under which he acted, but alleged that he "did commit a misdemeanor, to wit: by maliciously and wilfully cutting the water-main" of defendant, against the statute (Penal Code, § 639), which provides that "any person who wilfully or maliciously displaces, removes, injures or destroys * * * a pipe or main for conducting water or gas * * * is punishable by imprisonment for not more than two years." A warrant was issued and plaintiff arrested thereunder and brought before the magistrate, and defendant insisted that he should be "locked up." The pro-

ceedings were adjourned and were terminated subsequently by his discharge.

Further facts appear in the opinion.

Wm. J. Gaynor for appellant. The motion for a nonsuit should have been granted. (Penal Code, § 639; *Anderson* v. *Howe*, 116 N. Y. 336.)

Edward H. Kissam for respondent. Questions of facts cannot be reviewed as there is no certificate that, nor in fact does, the case contain all the evidence. (*Porter* v. *Smith*, 35 Hun, 118; 107 N. Y. 531; *Aldridge* v. *Aldridge*, 120 id. 616; *Halpin* v. *Ins. Co.*, 118 id. 165; *Fagnan* v. *Knox*, 66 id. 531.) The only question that can possibly be raised is probable cause. This is a mixed proposition of law and fact and should be left to the jury under instructions. (*Heyne* v. *Blair*, 62 N. Y. 22; *Besson* v. *Southard*, 5 Seld. 236; *Miller* v. *Milligan*, 48 Barb. 30; *Stevens* v. *Lacour*, 10 id. 66; *Bulkley* v. *Keteltas*, 6 N. Y. 384; *Young* v. *Lyall*, 23 N. Y. S. R. 215; *Gierhaw* v. *Ludlow*, 6 N. Y. Supp. 111; *Collins* v. *Manning*, 32 N. Y. S. R. 998; *Hall* v. *Kehoe*, 28 id. 357; *James* v. *Phelps*, 11 A. & E. 483; *Carl* v. *Ayres*, 53 N. Y. 17; *Rockwell* v. *Brown*, 36 id. 207; *Von Latham* v. *Libby*, 38 Barb. 339.) Defendant had no probable cause. (Penal Code, § 639; *Fagnan* v. *Knox*, 66 N. Y. 528.) If the jury had any evidence which might sustain the verdict, it is sufficient. (Moak's Underhill on Torts, 163.)

ANDREWS, J. The right of the park commissioners of Brooklyn to terminate their contract of May 5, 1885, with the defendant at any time, and thereupon to disconnect the water pipes of the defendant from the mains in Ocean parkway belonging to the city and under the control of the commissioners was, by the contract, dependent upon the failure or neglect of the defendant to furnish water according to his proposal, otherwise it could not be terminated and the water could not be cut off until six months after notice given by the

commissioners of their election to terminate the agreement. On November 26, 1886, the commissioners caused a written notice to be served on the defendant that they had annulled the contract for the reason, as stated therein, that the defendant "has not performed the conditions of the contract," and the notice further advised the defendant that the commissioners were about to cut the connections and notified him to protect his pipes and other property from any damage. It does not appear whether, in fact, the circumstances justified the commissioners in making an immediate disconnection under the terms of the contract. The commissioners, by a written order dated November 27, 1886, directed the plaintiff, who was in their employment, to disconnect the pipes. While he was engaged in executing the order the defendant protested and threatened to "*jug*" him if he continued the work. He, however, completed it, and on the 1st of December, 1886, the defendant presented to a magistrate a verified complaint, setting forth that the plaintiff and others on the 1st day of December, 1886, "did commit a misdemeanor, to wit, by maliciously and wilfully cutting the water main, the property of the Kings County Water Supply Company and Benjamin F. Stephens, in the town of Gravesend, Kings county, against the statute," etc. The magistrate thereupon issued a warrant for the arrest of the plaintiff, upon which he was arrested and brought before the magistrate, and the proceeding was finally terminated by his discharge on the 26th of March, 1887. This is the prosecution upon which the present action is based.

It appears that the defendant when he made the complaint knew that the plaintiff in disconnecting the pipes was acting under the orders of his superior officers, the park commissioners. But the defendant did not disclose this fact in his complaint to the magistrate. When the plaintiff was brought before the magistrate the proceedings were adjourned and, as appears from the testimony on the part of the plaintiff, the defendant insisted that the plaintiff should be "locked up." There was evidence given tending to show that the work of

disconnecting the pipes was done in a proper manner and so as to cause no unnecessary injury to the defendant's pipes. The court on the trial submitted to the jury the question of probable cause for instituting the prosecution before the magistrate, and also the question of malice. The jury found against the defendant on both questions, and it is now insisted that there was not only no evidence of the absence of probable cause, but that it affirmatively appeared upon the plaintiff's own showing that there was probable cause for the arrest.

The Penal Code (§ 639) provides that: "Any person who wilfully or maliciously displaces, removes, injures or destroys * * * a pipe or main for conducting water or gas * * * is punishable by imprisonment for not more than two years." The complaint made by the defendant before the magistrate charged the plaintiff with the offense under this statute, and to sustain the present action it was incumbent upon the plaintiff, among other things, to give evidence showing, or from which the jury might find that the defendant had no probable cause for believing that the plaintiff had committed the crime charged. The action for malicious prosecution is very ancient. The law puts no direct restraint upon the institution by one person of a civil action or a criminal prosecution against another. He may put in motion the civil or criminal law at his pleasure for the enforcement of an alleged private right or the punishment of an alleged public wrong. But if he acts from malice and institutes a groundless prosecution against another, either civil or criminal, the law affords to the injured party a remedy through an action for damages for malicious prosecution. The plaintiff, to maintain the action, must show that the prosecution was instigated by the defendant, that it has been determined in his favor, that there was no probable cause and that the defendant acted from malice. The question of probable cause may be a question of law for the court, or of fact for the jury, depending upon the circumstances. If the facts are undisputed and admit of but one inference, the question is one of law; if disputed, or if capable of opposing

inferences, the question is for the jury. (*James* v. *Phelps*, 11 A. & E. 483.)

It is plain that the plaintiff committed no criminal offense in disconnecting the pipes. The work was done on the premises under the jurisdiction of the commissioners and by their direction. Whether or not the commissioners were justified under their contract with the defendant in directing the pipes to be disconnected, was a matter not within the knowledge of the plaintiff, and with which he had no concern. He was bound to execute the orders of his superiors so long as they required him to do nothing in its nature criminal. If the commissioners violated their contract with the defendant, he had his remedy by action. When the defendant applied to the magistrate for a warrant, he was chargeable with knowledge that in obeying the directions of the park commissioners the plaintiff had not "maliciously and wilfully" disconnected the pipes as charged in his complaint. He did not disclose to the magistrate the relation in which the plaintiff stood to the commissioners, or the circumstances under which he acted. There was at least evidence to go to the jury upon both the questions of probable cause and malice. While it is true that what constitutes probable cause, where an arrest has been made, does not depend upon the question whether an offense has been actually committed, or upon the innocence of the accused, but upon the prosecutor's belief of his guilt, based upon reasonable grounds (1 Cush. 288; *Fagnan* v. *Knox*, 66 N. Y. 525), nevertheless, applying this test in this case, the jury were justified in their conclusion that the defendant had no reasonable ground for believing that the charge made by him was true. The plaintiff intentionally disconnected the pipes, and it may be conceded in so doing violated a right of the defendant. But the word "wilfully" in the statute means something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or

lawlessness. Our attention has been called to the case of *Anderson* v. *How* (116 N. Y. 336), as justifying a broader interpretation. There is some color for this claim in some remarks in the prevailing opinion, but as we understand the case the judgment proceeded on the ground that upon the evidence the existence of probable cause was proved, in that the act for which the plaintiff was arrested, was wanton and malicious.

We find no error in the record, and the judgment should be affirmed.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. BENJAMIN W. WINANS et al., Appellants, *v.* AMBROSE T. ADAMS et al., Respondents.

In an action brought by the attorney-general, under the Code of Civil Procedure (§§ 1948, 1949), to try the title to certain elective offices in a religious corporation, the complaint demanded costs against the defendants, of whom there were ten, and that each of them be required to pay to the state a fine of $2,000, as authorized by the Code (§ 1956). It did not appear that the offices in litigation were of any value in themselves, or that there were any emoluments or pecuniary advantages attached to them. The complaint was dismissed and an extra allowance of $350 was made, based upon the ground that the complaint contained a claim of $20,000. *Held*, error; that the demand in the complaint that the defendants be fined was not a claim that could form the basis of an extra allowance; that the fine was not a part of the cause of action or claim, but a mere incident to success in the action, resting wholly in the discretion of the court, which, if plaintiff had succeeded, could have been imposed whether alleged in the complaint or not; and that by demanding it, plaintiffs did not engraft upon the complaint any element of a pecuniary claim within the meaning of that term as used in the provision of said Code (§ 3253), authorizing an extra allowance.

No power is given under said provision to grant an extra allowance, except upon the basis of the value of the claim or subject-matter involved in the action and litigated directly, not incidentally.

(Argued June 16, 1891; decided June 23. 1891.)

Opinion of the Court, per O'BRIEN, J.

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 20, 1891, which affirmed an order of the Circuit granting defendants an extra allowance.

The facts, so far as material, are stated in the opinion.

William H. Arnoux for appellants. An allowance can only be granted when the subject-matter of the litigation has a money value. (*Adams* v. *Arkenburgh*, 106 N. Y. 615; *Conaughty* v. *S. C. Bank*, 92 id. 404; *People* v. *A. & S. R. R. Co.*, 5 Lans. 35; *A. D. Co.* v. *Libbey*, 45 N. Y. 499.) A fine is not a claim. (Code Civ. Pro. §§ 1956, 3253; *McLean* v. *Freeman*, 70 N. Y. 89; *Atty.-Gen.* v. *L. Ins. Co.*, 91 id. 66.)

Hoffman Miller for respondents. In actions of this character the proceedings are the same as in an action by a private person. (Code Civ. Pro. §§ 1984, 1985, 1986; *Adams* v. *Arkenburgh*, 106 N. Y. 618.) The court had power, under the Code, to grant the allowance. (Code Civ. Pro. § 3253; *Adams* v. *Arkenburgh*, 106 N. Y. 615; *Mingay* v. *H. M Co.*, 99 id. 270.)

O'BRIEN, J. This was an action brought by the attorney-general, under sections 1948 and 1949 of the Code of Civil Procedure. The complaint alleges that on the 7th day of April, 1890, the relators, ten in number, were duly elected, respectively, wardens and vestrymen of the Church of the Holy Nativity, a Protestant Episcopal church in the city of New York.

That the defendants Adams and Townsend unlawfully intruded into the office of wardens and the other defendants into the office of vestrymen of said church, and were unlawfully holding these offices in violation of the rights of the relators. Judgment was demanded that the defendants were not entitled to the office into which they respectively had intruded, and that they be ousted and excluded therefrom, and that the relators be put in possession of the offices to which

they were respectively elected as alleged. Costs were demanded against the defendants, and that each of them pay to the people of the state of New York a fine of two thousand dollars. On the trial, the complaint was dismissed, with costs, and an order made granting the defendants an extra allowance of $350. The only basis for the allowance was the demand that each defendant be fined two thousand dollars, and as there were ten defendants, it was held that the complaint contained a claim against the defendants of twenty thousand dollars in the aggregate. The order has been affirmed at General Term. The only question presented by the appeal is whether the court had power to grant an allowance in the action. Section 3253 of the Code of Civil Procedure confers power on the court, in its discretion, to award to the successful party a sum not exceeding five per centum upon the sum recovered *or claimed*, or the value of the subject-matter involved. And section 1956 provides that in actions such as this the court may, in its discretion, also award that the defendant pay a fine to the people of the state not exceeding $2,000, and if such fine is imposed, execution may be issued upon the judgment and when the fine is collected, it must be paid into the treasury of the state. The relators could have no interest in the fine, and no one could demand that it be imposed as a legal right. The cause of action or claim set forth in the complaint was the intrusion of the defendants into an office in a domestic corporation from which it was sought to oust them, and to put the relators in possession thereof. The fine was a mere incident that might or might not follow the success of the action, resting wholly in the discretion of the court with reference to the facts and circumstances of the case. It was no part of the claim or cause of action. It was not necessary to demand it in the complaint, as the court could have imposed it, whether demanded or not, upon a proper state of facts. By demanding it, the plaintiff did not change the character of the action or engraft upon the complaint any element of a pecuniary claim within the meaning of that term as used in the section of the Code above referred to. There was no power in this

Statement of case.

case to grant to the defendants an extra allowance except upon the basis of the value of the claim or subject-matter involved in the action, and litigated directly and not incidentally. (*Atlantic Dock Co.* v. *Libby*, 45 N. Y. 499; *Adams* v. *Arkenburgh*, 106 id. 615; *Conaughty* v. *Sar. Co. Bank*, 92 id. 404.)

The action was brought to try the title to certain elective offices in a religious corporation. It does not appear that these offices were of any value in themselves, or that there were any emoluments or pecuniary advantages attached to them, and hence it cannot be said that the subject-matter of the action was of any value whatever. The entirely unnecessary demand that each of the ten defendants be fined two thousand dollars, was not a claim that could form the basis of an allowance any more than would a request at the trial that the discretion of the court in that regard be exercised.

The orders of the General and Special Terms should be reversed, with costs in all courts.

All concur.

Orders reversed.

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JAMES GALWAY, Respondent, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY et al., Appellants.

Trespasses upon real property effected by an unlawful structure or nuisance are continuous in their nature and give separate successive causes of action from time to time as the injuries are perpetrated, barred only by the running of the statute against the successive trespasses.

No lapse of time or inaction merely on the part of an owner after the erection and during the maintenance of the unlawful structure, unless it has continued for such a period of time as will effect a change of title in the property or authorize the presumption of a grant, is sufficient to defeat the right of the owner to his action at law or equity.

So also, the right of an abutting owner to maintain an action at law or equity because of an invasion of his rights in a public street by the erection thereon of a structure which impairs his easement therein, continues so long as he continues to be the owner of the property, without regard to the lapse of time, provided the remedy is claimed within the statutory period of limitation applicable to the legal right and before adverse possession has barred his title.

Statement of case.

It is immaterial, either in equity or law, whether the injuries done were originally intended by the wrong-doer to be perpetual and permanent, or were of a temporary nature only and occasional in their operation.

While, therefore, the lapse of six years after the erection of such a structure bars not only the legal, but is a practical defense to an equitable action, based upon the original trespass, if the structure is continued new causes of action arise, unbarred by any rule of law or equity and cognizable not only at law but in equity until the statute has run as against each.

Accordingly *held*, that the right to bring an action to restrain an elevated railroad company which had constructed its road in a street in front of plaintiff's premises and thereby unlawfully interfered with plaintiff's easements in the street, was not barred by the lapse of ten years from the time the road was constructed. (Code Civ. Pro. § 388.)

The doctrine of acquiescence as a defense to an equity action is limited to actions of an equitable nature exclusively, or to those where the legal right has expired, or the party has lost his right of property by prescription or adverse possession.

Where a legal right is involved, and upon grounds of equity jurisdiction the courts have been called upon to sustain the legal right, the mere *laches* of a party, unaccompanied by circumstances amounting to an estoppel, constitute no defense.

The rule requiring promptness in soliciting the intervention of a court of equity, is always addressed to the discretion of the court and varies according to the situation of the parties, the nature of the relief demanded and the circumstances of the case.

A court having authority to grant a perpetual injunction to restrain such continuous trespasses, does not impair the exercise of its authority by permitting, and it may permit, the wrong-doer to escape its effect by voluntarily paying the owner a specified sum for the property injured.

In such an action brought in 1889 it appeared that plaintiff obtained title to his premises prior to the year 1878, during which year defendant, without acquiring the easements or consents of the abutting owners, commenced and completed its road. The court found that plaintiff saw the road from time to time while in process of construction and occasionally took passage upon it; that he had subscribed to a fund to pay counsel to prevent its erection, but prior to the commencement of this action made no protest and instituted no legal proceeding to prevent its construction or operation. It was also found that after this action was commenced defendant instituted proceedings to condemn said easements, which were pending at the time of the trial. The court granted an injunction unless defendant pay to plaintiff a certain sum, as the depreciation of the value of the premises, upon his executing to it a conveyance of said easements. *Held*, no error.

(Argued May 4, 1891; decided October 6, 1891.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1890, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John F. Dillon and *Julien T. Davies* for appellants. The plaintiff's right to maintain an action in equity to enjoin the maintenance and operation of the defendants' railway, and to recover damages to the inheritance by reason of the permanence of the structure, is barred by the ten years' limitation contained in section 388 of the Code of Civil Procedure. (*Atwater* v. *Fowler*, 1 Edw. 417; *Ray* v. *Bogart*, 2 Johns. Cas. 432; *Arden* v. *Arden*, 1 Johns. Ch. 313; *Ellison* v. *Moffatt*, 7 id. 46; *Rayner* v. *Pearsall*, 3 id. 578; *Phillips* v. *Provost*, 4 id. 205; *Mooers* v. *White*, 6 id. 360; *Kingslands* v. *Roberts*, 2 Paige, 193; *Spoor* v. *Wells*, 3 Barb. Ch. 199; *Plet* v. *Bouchaud*, 4 Edw. 30; *Calhoun* v. *Millard*, 121 N. Y. 69; *Butler* v. *Johnson*, 111 id. 204; *Hubbell* v. *Sibley*, 50 id. 468; *Peters* v. *Delaplaine*, 49 id. 362, 371; *Oakes* v. *Howell*, 27 How. Pr. 145; *Roberts* v. *Sykes*, 30 Barb. 173; *Wood* v. *Wood*, 26 id. 356, 361; *Salisbury* v. *Morss*, 7 Lans. 359; *Uline* v. *N. Y. C. R. R. Co.*, 101 N. Y. 98; *Lahr* v. *M. E. R. Co.*, 104 id. 295; *Pond* v. *M. E. R. Co.*, 112 id. 186; *Morris* v. *Budlong*, 78 id. 543; *Mann* v. *Fairchild*, 14 Barb. 548; *Still* v. *Holbrook*, 23 Hun, 517; *Rodman* v. *Devlin*, Id. 590; *Hoyt* v. *Tuthill*, 33 id. 196.) Courts of equity have exclusive jurisdiction of suits for injunction. (*Tallman* v. *M. E. R. Co.*, 121 N. Y. 119; *Knox* v. *M. E. R. Co.*, 36 N. Y. S. R. 2; 1 Pom. Eq. Juris. § 136; *People* v. *Clark*, 70 N. Y. 518; *L. C. N. Bank* v. *Guynn*, 6 Bush. 486; *Menard* v. *Hood*, 68 Ill. 121; *Wangelin* v. *Goe*, 50 id. 459; *Attorney-General* v. *N. J. R. & T. Co.*, 3 N. J. Eq. 136; *Owen* v. *Ford*, 49 Mo. 436; *C. & O. R. Co.* v. *Patten*, 5 W. Va. 234; *Cole* v. *Duke*, 79 Ind. 107; *G. P. R. Co.* v. *Mayor, etc.*, 75

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Ga. 828; *Thomas* v. *M. M. P. Union*, 121 N. Y. 45, 52; *Health Dept.* v. *Purdon*, 99 id. 237; *McHenry* v. *Jewett*, 90 id. 58; *Campbell* v. *Seaman*, 63 id. 568, 580, 582, 583; *T. & B. R. Co.* v. *B., H. T. & W. R. Co.*, 86 id. 106, 123; *Jerome* v. *Ross*, 7 Johns. Ch. 315; *Livingston* v. *Livingston*, 6 id. 497; *Akrill* v. *Seldon*, 1 Barb. 316; *Cockey* v. *Carroll*, 4 Md. Ch. 344; *Frink* v. *Stewart*, 94 N. C. 484; *Hart* v. *Marshall*, 4 Minn. 294; *Cox* v. *Douglass*, 20 W. Va. 175; *E. L. & B. Assn.* v. *Atlanta*, 77 Ga. 496; *Ellis* v. *Wren*, 84 Ky. 254; *Haskell* v. *Thurston*, 80 Me. 129; High. on Inj. §§ 9, 22; *Morgan* v. *City of Binghamton*, 102 N. Y. 500; *Attorney-General* v. *Nicholl*, 16 Ves., Jr., 342; *Attorney-General* v. *Gee*, 10 Eq. 136; *Vernam* v. *Palmer*, 5 N. Y. Supp. 71; *People* v. *Canal Board*, 55 N. Y. 397; *T. & B. R. Co.* v. *B., H. T. & W. R. Co.*, 107 id. 107, 123; *Hart* v. *Mayor, etc.*, 9 Wend. 571; 3 Paige, 213; *Fox* v. *Fitzsimmons*, 29 Hun, 576; *Johnson* v. *City of Rochester*, 13 id. 285; *W. U. T. Co.* v. *Judkins*, 75 Ala. 428; *M. S. Mills* v. *Hickey*, 59 N. H. 241; *Weigel* v. *Walsh*, 45 Mo. 560; *Germania* v. *Clark*, 71 N. C. 417; *Shipley* v. *Ritter*, 7 Md. 408; *Ross* v. *Page*, 6 Ohio, 166; *Bethune* v. *Wilkins*, 8 Ga. 118; *Smith* v. *Gardner*, 12 Ore. 221; *Thorn* v. *Sweeney*, 12 Nev. 251; *McKeon* v. *See*, 51 N. Y. 300, 307; *Corning* v. *T. I. & N. Factory*, 40 id. 191, 206; *M. B. Co.* v. *U. & S. R. Co.*, 6 Paige, 554, 563; *Dunsbach* v. *Hollister*, 49 Hun, 352; *Olmsted* v. *Rich*, 6 N. Y. Supp. 826; *Parker* v. *W. L. C. & W. Co.*, 2 Black [U. S.], 545, 551; *Coe* v. *W. M. Co.*, 37 N. H. 254, 261; *Bunnell's Appeal*, 64 Penn. St. 59, 62; *Carlisle* v. *Cooper*, 21 N. J. Eq. 576, 579; *Hawley* v. *Beardsley*, 47 Conn. 571; *Fort* v. *Groves*, 29 Md. 188; *Cherry* v. *Stein*, 11 id. 1; *McCord* v. *Iker*, 12 Ohio, 387; *Norris* v. *Hill*, 1 Mich. 202, 210; *Dent* v. *A. M. Assn.*, 35 L. J. Ch. 555; *Swaine* v. *Great N. R. Co.*, 33 id. 399; *Attorney-General* v. *S. G. Co.*, 3 DeG., M. & G. 304; *Wood* v. *Sutcliffe*, 2 Sim. [N. S.] 163, 165, 166.) The statute commenced to run, at the latest, upon the completion of the defendants' railway. (Code Civ. Pro. § 415; *Story* v. *N. Y. E. R. Co.*, 90 N. Y. 160, 170, 178; *Fobes* v. *R., W. & O. R.*

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Co., 121 id. 505; *Kane* v. *N. Y. E. R. Co.*, 34 N. Y. S. R. 885; *Lahr* v. *M. E. R. Co.*, 104 N. Y. 295; *Tallman* v. *M. E. R. Co.*, 121 id. 119; *N. Y. E. R. Co.* v. *F. N. Bank*, 135 U. S. 432, 440; *Colrick* v. *Swinburne*, 105 N. Y. 503; *S. M. Co.* v. *State*, Id. 562; *Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 id. 98; *Arnold* v. *H. R. R. Co.*, 55 id. 661; *Waggoner* v. *Jermaine*, 3 Den. 306; *Newman* v. *M. E. R. Co.*, 118 N. Y. 618; *G. L. M. Co.* v. *Clague*, L. R. [4 App. Cas.] 115; *C. & E. I. R. Co.* v. *McAulay*, 121 Ill. 160; *C. & E. I. R. Co.* v. *Loeb*, 118 id. 203; *K. & S. R. Co.* v. *Horan*, 131 id. 288; *James* v. *City of Kansas*, 83 Mo. 567; *Pratt* v. *D. M. N. W. R. Co.*, 72 Ia. 249; *Powers* v. *City of Council Bluffs*, 45 id. 652; *K. P. R. Co.* v. *Mihlman*, 17 Kan. 224; *Frankle* v. *Jackson*, 30 Fed. Rep. 398; *Lyies* v. *T. & N. O. R. Co.*, 73 Tex. 95; *H. & T. C. R. Co.* v. *Chaffin*, 60 id. 554; *Acker* v. *Acker*, 81 N. Y. 143, 148; *Johnson* v. *A. & S. R. Co.*, 54 id. 416, 424; *Waltermire* v. *Westover*, 14 id. 16, 20; *Rawls* v. *A. L. Ins. Co.*, 36 Barb. 357, 361.) The plaintiff is precluded by his *laches* and acquiescence from seeking relief in a court of equity. (*Smith* v. *Clay*, 2 Ambl. 645; *Calhoun* v. *Millard*, 121 N. Y. 69; *Lyon* v. *Park*, 111 id. 350; *W. U. T. Co.* v. *Judkins*, 75 Ala. 428; *Bigelow* v. *City of Los Angeles*, 85 Cal. 614; *P. & A. R. Co.* v. *Jackson*, 21 Fla. 146; *Griffin* v. *A. & K. R. Co.*, 70 Ga. 164; *M. R. Co.* v. *Smith*, 113 Ind. 233, 236; *City of Logansport* v. *Uhl*, 99 id. 531; *B. & O. R. Co.* v. *Strauss*, 37 Md. 237; *Spencer* v. *F. T. Co.*, 70 id. 136; *D. M. O. & Co.* v. *M. P. R. Co.*, 37 Fed. Rep. 830; *Bassett* v. *S. M. Co.*, 47 N. H. 426; *M. & E. R. Co.* v. *Prudden*, 20 N. J. Eq. 530; *Erie R. Co.* v. *D., L. & W. R. Co.*, 21 id. 283; *Pickert* v. *R. P. R. Co.*, 25 id. 316; *Traphagen* v. *Mayor, etc.*, 29 id. 206; *Meredith* v. *Sayre*, 32 id. 557; *Goodin* v. *C. & W. C. Co.*, 18 Ohio St. 169, 179; *P. Co.* v. *Platt*, 25 N. E. Rep. 1028; *Pettibone* v. *L. C. & M. R. Co.*, 14 Wis. 443; *Wood* v. *C. C. R. Co.*, 33 Beav. 290; *Greenhalgh* v. *M. & L. R. Co.*, 3 M. & C. 784; *Peck* v. *Goodberlett*, 109 N. Y. 189; *M. A. Church* v. *O. S. Church*, 73 id. 95; *Wisner* v. *Ocumpaugh*, 71 id. 113;

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I., R. & M. R. Co. v. *Allen*, 113 Ind. 581; *Bravard* v. *C., H. & I. R. Co.*, 115 id. 1; *Sherlock* v. *L., N. A. & C. R. Co.*, Id. 222; *L., N. A. & C R. Co.* v. *Soltweddle*, 106 id. 257; *L., N. A. & C. R. Co.* v. *Beck*, 119 id. 124; *St. Julien* v. *M. L. & T. R. Co.*, 35 La. Ann. 924; *Lawrence* v. *M. L. & T. R. Co.*, 39 id. 427; *Provolt* v. *C., R. I. & P. R. Co.*, 57 Mo. 256; *Baker* v. *C., R. I. & P. R. Co.*, Id. 265; *Kanaga* v. *S. L., L. & W. R. Co.*, 76 Mo. 207; *Gray* v. *S. L. & F. R. Co.*, 81 id. 126; *Pryzbylowicz* v. *M. R. R. Co.*, 17 Fed. Rep. 492; *O. & N. W. R. Co.* v. *Redick*, 16 Neb. 313; *Verdier* v. *P. R. R. Co.*, 15 S. C. 476; *Tompkins* v. *A. & K. R. Co.*, 21 id. 421.) The court having found that the rental value of plaintiff's lots has not been damaged by the railway, the injunction could only have been granted as a means of compelling payment of permanent damages sustained when the road was built in June, 1878. (*McHenry* v. *Jewett*, 90 N. Y. 58; *Health Dept.* v. *Purdon*, 99 id. 237; *Moors* v. *Railroad Co.*, 108 id. 98; *Cooke* v. *Flatbush Water Works*, 27 Hun, 72; *Wergil* v. *Walsh*, 45 Mo. 560; *Indianapolis, etc., Co.* v. *Indianapolis*, 29 Ind. 452; *Cross* v. *Morristown*, 3 id. 305; *Laney* v. *Jasper*, 39 Ill. 46; *Blanchard* v. *Doering*, 23 Wis. 200; *Owen* v. *Field*, 12 Allen, 457; *Pott* v. *Smith*, L. R. [6 Eq.] 311; *People* v. *Canal Board*, 55 N. Y. 397.) The finding of the trial court that the value of plaintiff's easements is $20,000 is contrary to law and wholly unsupported by evidence. (Code Civ. Pro. § 993; *Bedlow* v. *F. D. D. Co.*, 112 N. Y. 263, 269; *Todd* v. *Nelson*, 109 id. 316, 322; *Ryan* v. *M. R. Co.*, 121 id. 126, 133; *Dwight* v. *G. L. I. Co.*, 103 id. 341, 359; *Taylor* v. *City of Yonkers*, 108 id. 571, 577; *Kaveny* v. *City of Troy*, 105 id. 202, 208; *Wilds* v. *H. R. R. R. Co.*, 24 id. 430; *Deyo* v. *N. Y. C. R. R. Co.*, 34 id. 9; *Baulec* v. *N. Y. & H. R. Co.*, 59 N. Y. 356, 366; *Hyatt* v. *Johnson*, 91 Penn. St. 200; *I. Co.* v. *Munson*, 14 Wall. 442; *Newman* v. *M. E. R. Co.*, 118 N. Y. 618, 625; *Kenkele* v. *M. E. R. Co.*, 55 Hun, 398; *In re Public Parks*, 53 id. 304; *In re B. E. R. Co.*, 28 N. Y. S. R. 627; *Uline* v. *N. Y. C., etc., R. Co.*, 101 N. Y. 98, 118; *Story* v. *N. Y. E. R.*

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Co., 90 id. 122, 148, 171, 179; *Tallman* v. *M. E. R. Co.*, 121 id. 119, 125; *Abendroth* v. *M. R. Co.*, 122 id. 1, 17; *N. Y. E. R. Co.* v. *F. N. Bank*, 135 U. S. 432, 440; *Taylor* v. *M. E. R. Co.*, 18 J. & S. 322, 328; *S. A. R. Co.* v. *M. E. R. Co.*, 56 Hun, 182, 185; *Henderson* v. *N. Y. C. R. R. Co.*, 78 N. Y. 423, 430, 438; *Smith* v. *City of Rochester*, 92 id. 477, 478; *Glover* v. *M. R. Co.*, 19 J. & S. 1; *Methodist Society* v. *B. E. R. Co.*, 46 Hun, 530; *Vick* v. *City of Rochester*, Id. 607; Pom. Eq. Juris. § 109; *Worrall* v. *Mann*, 38 N. Y. 137, 142; *M. A. B. Church* v. *O. S. B. Church*, 73 id. 82, 95; *Murtha* v. *Curley*, 90 id. 372, 378; *Pond* v. *M. E. R. Co.*, 112 id. 182, 189, 190; *Helck* v. *Reinheimer*, 105 id. 470; *Jackson* v. *Van Slyke*, 52 id. 645; *H. Ins. Co.* v. *W. T. Co.*, 51 id. 93; *Wangler* v. *Swift*, 90 id. 38, 45.) To entitle the plaintiff to the aid of a court of equity it is essential, not only that he should have an existing right of property, but also that he should have an equity entitling him to the relief sought. The equity may fall within the bar of the statute, although the right of property may be unimpaired in the eye of the law. (*Power's Appeal*, 125 Penn. St. 175; *Wood* v. *Sutcliffe*, 2 Sim. [N. S.] 163; *Acker* v. *Acker*, 81 N. Y. 143, 148; *Johnson* v. *A. & S. R. Co.*, 54 id. 416, 424; *Waltermire* v. *Westover*, 14 id. 16, 20; *Wright* v. *S. B. & N. Y. R. Co.*, 49 Hun, 445.) If the *laches* and acquiescence of these plaintiffs and their predecessors in title were not sufficient to deprive them of all equitable relief, they were, in any event, sufficient to deprive them of any right to an injunction, and to limit the relief which should have been granted to a judgment for the damages to the inheritance. (1 Pom. Eq. Juris. 246, § 237; *Hatch* v. *Cobb*, 4 Johns. Ch. 559; *Kempshall* v. *Stone*, 5 id. 194; *Morss* v. *Elmendorff*, 11 Paige, 277; *Smith* v. *Kelley*, 56 Me. 64; *McQueen* v. *Chouteau*, 20 Mo. 222; *Doan* v. *Manzey*, 33 Ill. 227; *Gupton* v. *Gupton*, 47 Mo. 37; *Milkman* v. *Ordway*, 106 Mass. 232, 253; *Sternberger* v. *McGovern*, 56 N. Y. 12, 20; *Chartier* v. *Marshall*, 56 N. H. 478; *Atty.-Gen.* v. *D. R. B. Co.*, 105 Mass. 1; *Peabody* v. *Tarbell*, 2 Cush. 226; *Andrews* v. *Brown*, 3 id. 130; *Pingree* v. *Coffin*,

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12 Gray, 288, 305; *Woodcock* v. *Bennett*, 1 Cow. 711; *Phillips* v. *Thompson*, 1 Johns. Ch. 131; *Parkhurst* v. *Van Cortland*, Id. 273; *Woodward* v. *Harris*, 2 Barb. 439; *Berry* v. *Van Winkle*, 1 Green Ch. 267; *Copper* v. *Wells*, Saxton, 10; *Rees* v. *Smith*, 1 Ohio, 124; *Gibbs* v. *Champion*, 3 id. 335; *Jones* v. *Shackelford*, 2 Bibb. 410; *Fisher* v. *Kay*, Id. 434; *Rankin* v. *Maxwell*, 2 A. K. Marsh. 488; *Hopkins* v. *Gilman*, 22 Wis. 476; *Tenney* v. *State Bank*, 20 id. 152; *Hall* v. *Delaplaine*, 5 id. 206; *O'Meara* v. *N. A. M. Co.*, 2 Nev. 112; *Carroll* v. *Wilson*, 22 Ark. 32; *Harrison* v. *Deramus*, 33 Ala. 463; *Foley* v. *Crow*, 37 Md. 51; *Stevenson* v. *Buxton*, 37 Barb. 13; *Hamilton* v. *Hamilton*, 59 Mo. 232; *Denton* v. *Stewart*, 1 Cox, 258; *C. Co.* v. *Corbett*, 2 D. & S. 355; *Sayers* v. *Collyer*, L. R. [28 Ch. Div.] 103; *Pennington* v. *B. H. C. Co.*, 46 L. J. Ch. 773; *Senior* v. *Pawson*, L. R. [3 Eq.] 330.)

John E. Burrill and *George Zabriskie* for respondent. Nominal damages, which the defendants conceded by their requests to find, entitled plaintiff to an injunction on the principle that actual damages are not necessary to be shown when the wrongful act might furnish the foundation of a claim or right adverse to the owner of the dominant premises. (Goddard on Easements, 355, 357, 363, 445; *Henderson* v. *N. Y. C. R. R. Co.*, 78 N. Y. 423; *Shepard* v. *M. R. Co.*, 117 id. 443, 449; *Hussner* v. *B. R. Co.*, 114 id. 433; *Abendroth Case*, 122 id. 1; *Tallman Case*, 121 id. 123; *Meyer* v. *Phillips*, 97 id. 485; *Garwood* v. *N. Y. Co.*, 83 id. 404; *Smith* v. *City of Rochester*, 38 Hun, 612; 104 N. Y. 674; *Corning Case*, 39 Barb. 312, 326; 40 N. Y. 191; *Webb* v. *Portland Co.*, 3 Sum. 187.) The award of $20,000 as the value of the easements of light, air and access appurtenant to plaintiff's premises, which were taken and appropriated by the defendants in the construction and operation of their railroad, was reasonable and fully sustained by evidence. (*Henderson Case*, 78 N. Y. 423, 429, 430; 17 Hun, 344, 352; *N. Y. E. Bank Case*, 21 J. & S. 513; 108 N. Y. 660; *Carter's Case*, 25 J. & S. 279,

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281; *Eno's Case*, 24 id. 313, 318; *Lawrence Case*, 35 N. Y. S. R. 39; *People* v. *French*, 123 N. Y. 637; Code Civ. Pro. § 1337; *Leonard* v. *Tillotson*, 97 N. Y. 1; *In re Ross*, 87 id. 514; *Vermilyea* v. *Palmer*, 52 id. 471, 473; *Flack* v. *Green Island*, 122 id. 117; *Quincy* v. *White*, 63 id. 375.) The Statute of Limitations is no defense. (*Haight* v. *Price*, 21 N. Y. 241; *Campbell* v. *Seaman*, 63 id. 568; *Broiestedt* v. *South Co.*, 55 id. 220; *Tallman Case*, 121 id. 123.) Acquiescence is no defense. (*S. A. R. R. Co.* v. *G. E. R. R. Co.*, 3 Abb. [N. C.] 372; *Ode* v. *M. R. Co.*, 56 Hun, 199; *McMurray* v. *McMurray*, 66 N. Y. 176; *Tallman Case*, 121 id. 123; *Chapman* v. *City of Rochester*, 110 id. 273; *Haight* v. *Price*, 21 id. 241; *Ormsby* v. *Co.*, 56 id. 623; *Powers* v. *M. Co.*, 120 id. 178; *Menendez* v. *Holt*, 128 U. S. R. 523; *Knox* v. *M. Co.*, 58 Hun, 517; *Jewett* v. *Miller*, 10 N. Y. 402; *Campbell* v. *Seaman*, 63 id. 568; *N. Y. R. Co.* v. *Rothery*, 107 id. 313; *Calkins* v. *Bloomfield Co.*, 1 T. & C. 541; *Christianson* v. *Linford*, 3 Robt. 215; *Snow* v. *Williams*, 16 Hun, 468; *Broustedt* v. *S. Co.*, 55 N. Y. 220.) The exceptions taken by the defendants to the questions put to Christian are not well taken. (*Crawford* v. *M. E. R. Co.*, 120 N. Y. 625; *Ward* v. *Kilpatrick*, 85 id. 413, 417.) An exception to evidence on the sole ground of "immateriality" will not be sustained by reversing a judgment unless it appear affirmatively that the defeated party was prejudiced by such testimony and that it influenced the decision of the court or the verdict of the jury. (*McGean* v. *M. R. Co.*, 117 N. Y. 225.) The question was not immaterial. The witness was describing the structure and station which extended from Fifty-seventh to Fifty-ninth street, and which extended in front of plaintiff's premises. It was competent and proper to describe it as a whole and its use, in order that the court might determine the extent of the injury to plaintiff's premises. (*Rose* v. *Grover*, 5 M. & G. 613; *Lyon* v. *Fishmonger Co.*, 10 Ch. App. 679; *Van Brunt* v. *Ahearn*, 13 Hun, 388; *Crooke* v. *Anderson*, 23 id. 266; *Callanan* v. *Gilman*, 107 N. Y. 360.) The two questions put to O'Reilly were proper. (*McGean* v. *Railway Co.*, 117

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N. Y. 225; *Ross* v. *M. R. Co.*, 35 J. & S. 412; *Kuh* v. *M. E. R. Co.*, 9 N. Y. Supp. 710.)

RUGER, Ch. J. This is one of the usual actions in equity to restrain the defendants from further maintaining and operating an elevated street railroad on Sixth avenue in the city of New York adjacent to plaintiff's property, thereby unlawfully interfering with it.

This property consisted of five vacant lots, extending about one hundred and twenty-five feet along the easterly side of the avenue, between Fifty-seventh and Fifty-eighth streets, and was acquired by the plaintiff by purchase in and previous to 1871. The defendant, the Metropolitan Elevated Railway Company, commenced and completed the structure of its railroad between the months of January and July, 1878, and from the time of its completion to the commencement of this action, in 1889, it has, either by itself or through its lessee, The Manhattan Railway Company, continued to maintain and operate an elevated steam railroad in front of and adjoining the plaintiff's premises in Sixth avenue. No proceedings were taken by the railroad to acquire the easements of the abutting owners in the avenue, or their consent to its construction previous to the commencement of this action.

The plaintiff complained that by reason of the operation of such railroad, in impairing the easements of light, air and access to his premises, he had been damaged, and demanded judgment for such damages, as well as a perpetual injunction against the defendants from further operating and maintaining their railroad in front of his premises. A trial was had at Special Term and the court declined to award pecuniary damages to the plaintiff, but rendered judgment granting the relief by injunction, unless the defendant should pay to the plaintiff, within a limited time, the sum of twenty thousand dollars as the depreciation of the value of the premises caused by the railroad, and upon such payment being made required the plaintiff to execute to the defendant a conveyance of the easements. The depreciation in the value of plaintiff's

property by reason of the erection and maintenance of the railroad was found by the trial court to be twenty thousand dollars, and the evidence supported that finding. It was also found that the plaintiff saw the railroad in the course of construction in front of his premises, and, from time to time, saw what defendants were doing in respect thereto, and occasionally, as a passenger, rode upon it. He subscribed money to pay for counsel to prevent the erection of the road, but made no protest otherwise, and instituted no legal proceedings to enjoin its construction or operation prior to the commencement of this action. It was also found that after the commencement of this action, but before the trial, the defendants instituted proceedings for the condemnation of that part of the easements referred to which had been taken for the use of such railroad, and that such proceedings were pending undetermined at the time of the trial.

The defendants requested the trial court to find the following propositions of law: First. "That this action is barred by the Statute of Limitations;" and Second. "That plaintiff's alleged right of action is barred by his acquiescence in said railroad and its operation, and his use thereof as a passenger," and that he is estopped from maintaining the action. The court refused to find as requested, and it is conceded by the defendants that the exceptions to such refusal raise the only questions to be considered on this appeal.

It is claimed that the ten years Statute of Limitations commenced to run against an equity action from the time the plaintiff was first entitled to commence such action, and that period having elapsed, that the plaintiff was barred from maintaining such action by section 388 of the Code of Civil Procedure. This section is the general statute adopted in the Code as a precautionary measure, to cover cases inadvertently omitted or otherwise unprovided for.

The general right of an abutting owner on a public street to recover damages for an unlawful invasion of his easements by the erection and maintenance of an elevated railroad in the street adjoining his premises is not contested by the defend-

ants. Nor is the liability of the defendants to make compensation to the plaintiff for the injury inflicted upon his property by the construction and operation of their railroad disputed, or his right to maintain successive actions at law to recover damages for the injury to his easement; but it is claimed that he has lost the right to proceed in equity, not only by reason of the Statute of Limitations, but also by virtue of an equitable estoppel arising out of the alleged acquiescence in the admitted trespasses.

The case, therefore, involves the question how far, if at all, the owner has forfeited his rights in his property by reason of his alleged *laches* and inaction during the period of eleven years intervening between the construction of the road and the commencement of the action.

We think it would be impossible to sustain this appeal without unsettling the established law of the state. It is, in effect, an effort to exempt actions in equity from the operation of the well-settled principle that trespassers upon real property effected by an unlawful structure or nuisance, are continuous in their nature and give successive causes of action from time to time, as the injuries are perpetrated. The questions raised are answered by elementary principles established in this state by numerous reported cases. They are found in the two propositions that continuous injuries to real estate caused by the maintenance of a nuisance or other unlawful structure create separate causes of action barred only by the running of the statute against the successive trespasses, and the further principle that no lapse of time or inaction merely on the part of the plaintiff during the erection and maintenance of such structure, unless it has continued for the length of time necessary to effect a change of title in the property claimed to have been injured, is sufficient to defeat the right of the owner to damages.

It may be that there is no case where the precise question as to the application of section 388 to such causes of action has been directly decided in this state, but the rule follows as a logical conclusion from the cases, and it affords a strong argu-

it against the appellants' theory that, in the numerous cases his state in which the question has been involved, the point never before been taken by counsel for the trespasser in case in this court.

t is not claimed here that the plaintiff has ceased to be the ner of the easements impaired, or that any other party has uired title thereto, but it is argued that he has lost the right mploy the equitable power of the courts by reason of his lect to demand it within ten years from the time when a se of action accrued. Thus, although the wrongful acts y be continued and the owner subjected to irreparable ury, and his legal remedy may be either inadequate or uire that it should be sought through repeated and numer- actions at law, it is contended that the jurisdiction of an ity court shall be arrested at the very time when, in the erest of the public, the exercise of its power becomes the st apparent and necessary. This claim, we think, is alto- her untenable. The right of abutting owners to damages an invasion of their rights in the public streets is predi- ed upon the constitutional guarantees that no person shall deprived of life, liberty or property without due process of ; or have his property taken for public use without just mpensation, and it necessarily follows that so long as such son continues to be the owner of property and liable to be ured in respect thereto by the unlawful acts of others, he is itled to invoke the protection of the fundamental law, with- regard to the lapse of time that may occur before the com- ncement of legal proceedings, provided the remedy is imed within the statutory period of limitation applicable to legal right, or before adverse possession has barred his title the property injured. (*Uline* v. *N. Y. C. & H. R. R. R.* , 101 N. Y. 98; *Arnold* v. *H. R. R. R. Co.*, 55 id. 661; *brick* v. *Swinburne*, 105 id. 503; *Tallman* v. *M. E. R. R.* , 121 id. 123.)

The cause of action, both at law and equity, in such cases ses out of the trespasses committed, and is based on the own- hip of the property upon which the injuries are inflicted,

and it is obvious that no cause of action can be barred while there is an outstanding legal cause of action for which the party has a legal remedy. The existence of a legal cause of action is not only a prerequisite to the maintenance of the equitable action, but is also the foundation of the jurisdiction which equity courts possess in respect to the subject-matter.

The questions presented have been so frequently considered and decided in this court in analogous cases adversely to the contention of the appellants, that they should no longer be the subject of controversy or debate. The learning and ability, however, with which the counsel for the appellants have pressed their case before us, have induced us to treat the questions argued at greater length than would otherwise have been thought necessary or proper, and we, therefore, indicate briefly the general theory upon which this court has proceeded in the determination of like questions.

That theory is concisely expressed by Judge EARL in the case of *Tallman* (*supra*). It was there said that "When the defendant began to construct its railway in front of the plaintiff's lots, he could have commenced an action in equity against it and restrained it until it had made compensation to him for the rights and easements which it took from him, or until it had acquired them by condemnation proceedings. In that way he would, at least in the theory of the law, have been indemnified for all the damage he would suffer by reason of the construction of the railway. Instead of taking his remedy by an equitable action at that time, he could have taken it at any time afterwards, during his ownership of the lots, with the same result. He was not, however, confined to his remedy by such an action. He could suffer the railway to be constructed and then bring successive actions to recover damages to his lots caused by the construction, maintenance and operation of the railway."

In the *Arnold* case it was held that an easement to carry water in a trunk over the land of another "was such an interest in land as could not be modified or discharged save by conveyance in writing or by operation of law; that it was prop-

erty within the meaning of article 1, section 6 of the Constitution, and, therefore, could not, nor could any portion of it be taken for public use without compensation," and "that this right of enjoying such easement was a continuous one, and the unlawful preventing its exercise a continuous injury, and that, therefore, the Statute of Limitations did not bar plaintiff's claim for the injuries sustained."

It is now the settled law of this state that no action at law can be maintained by an owner to recover prospective damages for injuries inflicted upon real property, and it is equally certain, we think, that an equity action for that purpose alone cannot be sustained. (*Uline* v. *N. Y. C. & H. R. R. R. Co.*, *supra*; *Pond* v. *Mc. Elevated R. Co.*, 112 N. Y. 187.)

Inasmuch as the equitable remedy depends, among other things, upon the existence of a legal cause of action, it follows that those facts which will bar the legal action will also afford an answer to the equitable remedy, and that so long as a legal remedy exists an equity court is open to aid in the enforcement of the legal claim.

When the trespass is of such a character that it may be discontinued at the option of the wrong-doer, or, if continued, is susceptible of having legal sanction obtained for its continuance, it seems offensive to our sense of right that a wrong-doer should be permitted to allege that his intention to repeat and continue his own unlawful conduct should deprive the owner of any of the remedies which the law has provided for his protection. If it were otherwise the wrong-doer would be permitted to show the aggravated character of his own conduct as a defense to the action of the legal owner and thus violate the rule of law, as well as the plainest principles of equity.

Upon settled principles a court of equity had unquestioned jurisdiction by reason of the continuance of the legal right and the inadequacy of the legal remedy to render the judgment pronounced in this case by the trial court. (*Henderson* v. *N. Y. C. R. R. Co.*, 78 N. Y. 423; *Tallman Case*, *supra*.)

That successive causes of action have accrued to the owner for each day's maintenance and operation of the railroad

structure adjoining his premises is undisputable, and that he is entitled to recover some damage for each trespass, even though it be nominal only, is equally undeniable. (*Colrick* v. *Swinburne*, *supra*.)

The plaintiff may delay his action and join together such causes of action as have not then outlawed, or he may bring an actain daily and recover such damages as he can establish. (*Baldwin* v. *Calkins*.)

In the case of unoccupied lands these damages may be small, but by delay the owner may lose them altogether, and in the meanwhile his toleration may be laying the foundation of an adverse claim to the property itself, and thus be the cause to him of irreparable injury. While it is indispensable to the protection of his rights that he should assert them before his right is barred, in such case it may not be to his interest to do so as often or as promptly as when his damages are large and immediate, but no bar from *laches* is available unless the legal action is barred.

The jurisdiction of equity arises by reason of the necessity of repeated actions at law to redress the owner's grievance and must, from the nature of the case, continue so long as that necessity exists.

The existence of either of the grounds of equity jurisdiction referred to, is sufficient to maintain an action, but they, in fact, are all present here and indicate the propriety of the judgment appealed from.

It was said by Judge EARL in *Campbell* v. *Seaman* (63 N. Y. 582) that "the right to an injunction, in a proper case, in England and in most of the states, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal, in a proper case, would be error to be corrected by a proper tribunal."

The lapse, therefore, of six years after a trespass has been committed upon real estate, bars not only the legal but also constitutes a practical defense to an equitable action founded

upon the necessity of numerous legal actions to obtain redress, because the right to such redress has as to such wrongs expired. But, if the trespasses are continued after that period, new causes of action arise, unbarred by any rule of law or equity, which are cognizable not only at law but also in equity. (*Uline Case, supra.*)

Section 388 of the Code finds its true interpretation when applied to causes of action founded upon equitable rights alone, or cases not specified in the general Statutes of Limitation.

It being conceded as to legal causes of action for trespass and nuisance, that the injuries thereby occasioned are continuous and arise from time to time as fresh trespasses are committed, it is difficult to see why the same principle should not apply with at least equal force and propriety to equitable actions. Indeed, it is obvious that it should be held to apply with greater reason to the latter, since otherwise the equity jurisdiction would be practically subverted. While the appellants' contention would permit the equity jurisdiction to be preserved for ten years, it precludes its exercise forever thereafter and leaves the evils of incessant litigation to harass the public for practically an unlimited period of time.

It would seem, therefore, that it is immaterial, either in equity or at law, whether the injuries done to the owner's property were originally intended by the wrong-doer to be perpetual and of a permanent character, or were of a temporary nature only and occasional in their operation. The law makes no distinction in the character of the injury, but prescribes one uniform principle for redress, without regard to the nature of the remedy pursued. (*Krehl* v. *Burrell*, L. R. (11 Ch. Div.) 146; *Henderson's Case, supra; Baldwin* v. *Calkins*, 10 Wend. 170; *Williams* v. *N. Y. Central R. R. Co.*, 16 N. Y. 111.)

The defendants' chief contention is that the relief in equity as now given against elevated railroads for invasions of the rights of abutting owners in streets, is practically an action to recover permanent damages for such injuries, and that, therefore, the Statute of Limitations should commence to run from the time when any cause of action arose.

There would be some force in this argument were that the real character of the action, or if the equity courts had assumed to exercise the power of awarding damages on that theory, but we know of no instance in which they have done so in this state. The action here is neither in practice nor theory an action of such a character and by its fundamental rules, as well as the constitutional requirement that compensation for such property shall be assessed by a jury or commission alone, an equity court is incapacitated from entertaining actions instituted for the purpose of recovering damages alone. (*Bradley* v. *Bosley*, 1 Barb. Ch. 125; *Morss* v. *Elmendorf*, 11 Paige, 277; Art. 1, § 7, Constitution.)

A court of law is the exclusive tribunal for the determination of such actions. We have been referred to no case in this state where an equity court has assumed the authority to render judgment for prospective damages against a wrong-doer, and, we think, in the nature of the jurisdiction of such courts, a suit brought for such a purpose alone is not authorized. To say, therefore, that an action in which the plaintiff has no legal right to demand permanent damages, and the court owes no legal duty to award them, affords the owner an adequate remedy for such damages, is to pervert the plain character of the action. While equity courts have frequently suspended the remedy, as they did in this case, by injunction upon conditions, as for a specified time, or until the wrong-doer has been afforded an opportunity to condemn the property invaded, or has satisfied the owner's damages, they have never, to our knowledge, rendered judgment for such damages or authorized the collection thereof by the owner. The privilege of securing the right to continue the trespasses complained of has, when authorized, been granted as an act of grace and favor to the offending party, and not as matter of right to the injured owner. As was said in the *Henderson* case: "Equitable relief is awarded, not as the defendant's counsel claims, by way of menace or as a means of compelling the payment of money, but that the defendant may desist from an unauthorized use of the plaintiff's property and forbear from any further interference with their rights."

Equity courts can, by virtue of their power to grant specific relief, obviate the difficulty attending an action at law in giving permanent damages for an injury to real property, by providing that a title to the easements required shall be conveyed as a condition of the relief granted. The court, having the authority to grant a perpetual injunction, does not impair its exercise of such authority by permitting the offender to escape its effect by voluntarily paying the owner for the property injured. It is thus left optional with the trespasser to remedy the wrong done by him, or to suffer the judgment of the court to stand.

While the injury inflicted upon the wrong-doer by neglect to comply with the conditions may be so onerous, in many cases, as to inflict great loss upon him, it, nevertheless, does no more than place in his hands the means of escaping from the disastrous consequences of a judgment which has been rendered imperative by his own wrongful conduct. A party who voluntarily prosecutes a public enterprise for his own benefit, without regard to the legal rights of individuals who may be damaged by its operation, must always run a great risk of being placed in a dangerous situation through his unlawful conduct; but this is the result of his own volition and the injury which necessarily follows such action cannot lawfully be imposed upon the parties injured without disregarding the constitutional provisions intended for their protection.

It furnishes no cause of complaint to the wrong-doer, that the court having power to restrain him altogether from continuing his trespasses, should mitigate the severity of its judgment by authorizing him to repeat them upon complying with special conditions prescribed by the judgment, so long as it is left to his election to perform them or not.

A consideration of the cases generally in which equity courts have exercised the power of giving damages as an incident of the equitable relief granted, seems to be unnessary in this case, as such courts in this state have not in this class of actions, so far as we know, assumed to exercise that power.

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The defendants also urge, as a reason why the Statute of Limitations should bar this action, that otherwise they will be embarrassed in their efforts to secure a right by prescription. We ascribe but little weight to this suggestion. The law applies a period of limitation to actions for the public benefit. They are termed statutes of repose and are founded upon the maxim "*Interest res publicæ ut sit finis litium.*" They are not intended for the benefit of wrong-doers, and while the law tolerates and protects title acquired by prescription when

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clearly made out, it does not favor or encourage that mode of acquiring property.

We are, therefore, of the opinion that the right to bring an equity action to restrain continuous trespasses upon real estate is not barred in ten years from the time of the original trespass, but may be sustained if brought at any time so long as the plaintiff has title to the property injured, and a cause of action for such injuries is not barred at law.

But the defendants, failing to establish the bar of the Statute of Limitations, still insist that the affiliated principle of acquiescence constitutes a defense to the action. There is no foundation in the case for a claim that the plaintiff's conduct amounted to an estoppel, and, indeed, the claim is not seriously urged by the appellants. It is obvious that such conduct has never led the defendants into a line of action which they would not otherwise have pursued, or encouraged them to expend money or make improvements by reason of their reliance upon the alleged inaction or acquiescence of the plaintiff. They inaugurated their enterprise in the face of persistent opposition by the plaintiff and other abutting owners, and carried it to completion while earnest efforts were being made to prevent them. From the inception of the enterprise to the present time, the claim that the defendants had a right to build their road in the streets of New York without compensating the abutting owners for the damages inflicted upon their property, has been uniformly denied and the defendants have continued the prosecution of their purpose regardless of their legal liability and in the face of strenuous opposition, with an apparent intention to wholly ignore the claims of such owners.

The judicial annals of the state are filled with the history of the litigations which have sprung out of the efforts of the elevated railroad companies to appropriate the property of the citizens of New York to the benefit of such railroads without compensation. In view of these facts, it is idle to claim that such companies have been induced in any respect to continue their enterprise in reliance upon the assumed acquiescence of the owners. (*Boardman* v. *L. S. & M. S. Ry. Co.*, 84 N. Y. 181.)

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The building and completion of their road in this case occurred in the first half of 1878, and was completed before the numerous parties concerned could have been fully awake to the real consequences of the enterprise. So far as the permanent structure is concerned, their expenditures were all incurred within six months and while the parties were making earnest efforts to stay any expenditures.

The case is entirely destitute of proof showing the existence of any elements of estoppel, and the defendants are, therefore, driven to rely, in this respect, upon the mere inaction of the plaintiff to prosecute his claim. This claim comes with little grace from parties who have for a much longer period neglected to take proceedings to acquire the real ownership of the property required by them in the prosecution of their enterprise.

But this question we also think is governed by authority equally conclusive with, that relating to the Statute of Limitations. The doctrine of acquiescence as a defense to an equity action has been generally limited here to those of an equitable nature exclusively, or to cases where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. Whatever may be the rule in other states, it can be said that here, no period of inaction merely has been held sufficient to justify a nuisance or trespass, unless it has continued for such a length of time as will authorize the presumption of a grant. The principle that so long as the legal right exists the owner is entitled to maintain his action in equity to restrain violations of this right, has been uniformly applied in this court. (*Tallman* v. *Met. El. R. Co.*, *supra*; *Arnold* v. *H. R. R. R. Co.*, *supra*; *Broiestedt* v. *S. S. R. R. Co.*, 55 N. Y. 220; *Campbell* v. *Seaman*, *supra*; *Ormsby* v. *Vt. Copper Mining Co.*, 56 N. Y. 623; *Haight* v. *Price*, 21 id. 241; *Viele* v. *Judson*, 82 id. 32; *N. Y. Rubber Co.* v. *Rothery*, 107 id. 310; *Chapman* v. *City of Rochester*, 110 id. 273.)

In the case of *Ormsby*, as appears by the head-note, it was held that "the doctrine of *laches* and acquiescence as a bar to an action through lapse of time, finds its just application in

respect to equitable rights only; as to legal rights, mere lapse of time before an action to enforce them, is of no moment, unless it comes up to the requirements of the Statute of Limitations."

In the *Chapman* case, this court held that the silence and inaction of the plaintiff while seeing the defendant construct sewers and spend large sums of money in completing a sewage system, which discharged the filth of the city into a stream belonging to the plaintiff, did not constitute a defense to an action for an injunction, no matter how long continued, unless accompanied by circumstances amounting to an estoppel.

It was held in *Haight* v. *Price*, "that no acquiescence short of twenty years repels the presumption that the diversion of a water-course was in hostility to the rights of the riparian proprietors, or authorizes the presumptien either of a grant or of license."

Judge EARL, in the *Campbell* case, said: "It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. * * * No act or omission of theirs induced the defendant to incur large expenses, or to take any action which could be the basis of an estoppel against them, and, therefore, there was no acquiescence or *laches* which should bar the plaintiffs within any rule laid down in any reported case."

In *Viele* v. *Judson*, Judge FINCH, in speaking of the cases where acquiescence had been held a bar, says: "In all of these the silence operated as a fraud and actually itself misled. In all there was both the specific opportunity and apparent duty to speak. And in all the party maintaining silence knew that some one was relying upon that silence, and either acting or about to act as he would not have done had the truth been told."

It was held in the *Broiestedt* case that the possession by a railroad company of a highway under a license given by statute, is presumed to be subordinate to the rights of the owner of the soil, and cannot be said to be adverse to him.

Opinion of the Court, per RUGER, Ch. J.

In the *N. Y. Rubber Co.* v. *Rothery*, the defendant had built expensive structures for manufacturing purposes and diverted the water from a stream adjoining plaintiff's premises for the purpose of supplying power to his machinery. It was claimed that the plaintiff, by her silence during the period when this work was going on, was barred of her action for damages. Judge PECKHAM, writing in the case, says: In this there was no element of an estoppel; to constitute it the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or omission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." (See also *McMurray* v. *McMurray*, 66 N. Y. 176.)

But we have already referred to a sufficient number of cases in this court to show how uniformly and frequently we have adhered to the doctrine, where a legal right is involved, and, upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal right, that the mere *laches* of a party, unaccompanied by circumstances amounting to an estoppel, constitutes no defense to such an action. Such is also the doctrine, generally, of the elementary writers. (2 Pomeroy's Eq. Jurisprudence, § 817; Bigelow on Estoppel, pp. 476 *et seq.*)

The same general principle has also been held in England. In the case of *Fullwood* v. *Fullwood* (L. R. [9 Ch. Div.] 176), FRY, Justice, says that "mere lapse of time unaccompanied by anything else has, in my judgment, just as much effect, and no more, in barring a suit for an injunction, as it has in barring an action for deceit."

And the head-note in *In re Maddever* (L. R. [27 Ch. Div.] 523), reads: "That as the plaintiff was coming to enforce a legal right, his mere delay to take proceedings was no defense, as it had not continued long enough to bar his legal right; the case standing on a different footing from a suit to set aside, on equitable grounds, a deed which was valid at law."

The Supreme Court of the United States have also laid down

the same rule in the recent case of *Menendez* v. *Holt* (128 U. S. 523), where Chief Justice FULLER, writing for the court, says: "Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half the trees upon the complainant's land, he had acquired by that negligence, the right to cut down the remainder. (*Attorney-General* v. *Eastlake*, 11 Hare, 205.)"

Even in cases where *laches* have been allowed to operate as a defense the question is to be determined in the discretion of the court upon all of the circumstances of the case. (*Fullwood* v. *Fullwood*, *supra*.)

There is nothing in the history of this case which induces us to suppose the court committed any error in the exercise of their discretion in granting the injunction appealed from.

The plaintiff had reason to suppose the defendants would discontinue their trespasses, or, if they were continued, they would resort to legal means to justify them. They had no reason to believe that the defendants deliberately intended to prosecute their enterprise, altogether regardless of the legal rights of others, and were justified in delaying a reasonable time in expectation that the defendants would eventually do justice to those whose property they were appropriating to their own use. The novelty of the questions presented; the vast number of people who were suffering similar injuries; the importance of the projected road for the public convenience, were all circumstances addressed to the discretion of the court upon the question of *laches*, and presented strong reasons why a strict rule should not be applied to the delay of the injured parties in seeking redress in this and similar cases.

The rule requiring promptness in soliciting the intervention of a court of equity, is always addressed to the discretion of the court, and varies much according to the situation of the parties, the nature of the relief demanded and the circum-

Statement of case.

stances of the case. (*Calhoun* v. *Millard*, 121 N. Y. 82; *Fullwood* v. *Fullwood*, *supra*; *Rayner* v. *Pearsall*, 3 Johns. Chy. 578; *Atwater* v. *Fowler*, 1 Edw. Chy. 420.) What might be considered an unjustifiable delay in one case would be considered reasonable in another, and an equity court which should refuse its aid to a party in protecting a legal right without a valid and sufficient reason, would be subject to the criticism of shutting the doors of the temple of justice in the face of meritorious suitors and condemning them to suffer remediless wrongs. The fact that the defendants intended to make their structure permanent, or made it so in fact, constitutes no defense to the action. (*Krehl* v. *Burrell*, L. R. [7 Ch. Div.] 551; Same case on appeal, L. R. [11 Ch. Div.] 146.)

For the reasons stated, we think the judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

JOHN REINING et al., Respondents, *v.* THE NEW YORK, LACKAWANNA AND WESTERN RAILWAY COMPANY, Appellant.

Owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil, are entitled to the benefit of the street in front of their premises for access and other purposes, and cannot be deprived thereof without compensation.

The right of such owners is not so absolute in its character that they can resist or prevent any and all interference with the street, to their detriment; nor can they assert it to stay the municipality in the control, regulation or improvement of the streets in the public interests, although it may be made to appear that the privileges said owners had enjoyed and the benefits they had derived from the street would be curtailed or impaired, to their injury, by the changes proposed.

As against abutting owners, having no title to the bed of a city street, it is competent for the legislature to authorize the construction of a horse or steam surface railroad therein, without making compensation to them for consequential damages, arising from a reasonable use of the street for purposes of such a railroad, not exclusive in its nature, and when the road is substantially on the same grade as the street itself and passage across and through the same is left free and unobstructed for the public use.

128 157
128 623

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136 531

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143 140

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151 161

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154 560

128 157
d156 488

128 157
169[10] 80
169 [3]284
169 [3]286

128 157
170 [3]306

128 157
173 [7]555
j173 [7]563

Statement of case.

Where, however, the street is practically and substantially closed against such owners for ordinary street uses, they are entitled to compensation.

Where a charter of a city confers upon its common council power to permit the track of a railroad to be laid in, along or across any street or public ground, this must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded.

It seems the primary object of the power to alter the grade of streets, conferred upon common councils in municipal charters, is to enable the municipal authorities to render a street more safe and convenient for public travel, to afford drainage and to adapt the street more perfectly for the purposes of a public way.

A municipality cannot, under the guise of exercising such power, appropriate a part of a street practically to the exclusive use of a railroad company and cut off abutting owners, without compensation, from using any part of it in the accustomed way.

Prior to 1875 plaintiffs owned certain premises on W. street in the city of Buffalo, their title extending to the centre of the street, subject to the public easement. In that year said city acquired by condemnation the title to a large number of its streets, including W. street, a uniform and nominal award of damages being paid to each of the owners, including plaintiffs. The city charter confers upon its common council power to alter the grade of streets and to "permit the track of a railroad to be laid in, along or across any street or public ground." (Laws 1870, chap. 519, tit. 9, §§ 1, 2, 6; tit. 3, § 19.) In 1882 said common council granted to defendant, a steam railroad corporation, the right to construct and maintain two tracks along the centre of W. street. In pursuance thereof and in accordance with the map and profile approved by said council and under the direction of the city engineer, defendant built an embankment in W. street in front of plaintiffs' premises, supported laterally by perpendicular stone walls, which practically excluded all abutting owners from that part of the street thus occupied, and so interfered with the use of the street as to cause the rental value of plaintiffs' premises to depreciate. *Held*, that an action was maintainable to recover damages for such depreciation.

Fobes v. *R., W. & O. R. R. Co.* (121 N. Y. 505); *Ottenot* v. *N. Y., L. & W. R. Co.* (119 id. 603), distinguished.

Also *held*, that the action of the common council in authorizing the construction of the embankment was not a change of grade within the meaning of the charter, and, therefore, the provision of the charter that "when the city shall alter the recorded grade of any street or alley, the owner of any house or lot fronting thereon may, within one year thereafter, claim damages by reason of such alteration" (Tit. 9, § 17), did not apply so as to confine the plaintiffs to a remedy against the city.

Also *held*, that while the authority conferred by the General Railroad Act (Chap. 140, Laws of 1850, § 24) upon railroad corporations to cross high-

ways in the construction of their lines, authorizes their construction on, over or below the highway grade, and so, to make such incidental changes of the grade as may be rendered necessary, without giving a right of action to abutting owners who sustain injury, the change here made did not come within that authority.

(Argued May 5, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made January 29, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

John G. Milburn for appellant. The defendant is not liable in this action for any diminution of the value of the use of the plaintiffs' premises caused by the raising of the grade of a portion of Water street, and the construction and operation of its railroad thereon. (*Fobes* v. *R., W. & O. R. R. Co.*, 121 N. Y. 505; Laws of 1870, chap. 519, tit. 9, § 17; *Conklin* v. *R. Co.*, 102 N. Y. 107; *White's Bank* v. *Nichols*, 64 id. 65; *English* v. *Brennan*, 60 id. 609; *Ins. Co.* v. *Stevens*, 87 id. 292; Laws of 1834, chap. 276, § 17; Laws of 1870, chap. 519, § 19; *Radcliff* v. *Mayor, etc.*, 4 N. Y. 195; *O'Connor* v. *Pittsburgh*, 18 Penn. St. 187; *Heiser* v. *City of New York*, 104 N. Y. 68; *Briggs* v. *R. R. Co.*, 79 Me. 363; *Wolfe* v. *R. R. Co.*, 15 B. Mon. 404; *Slatten* v. *R. R. Co.*, 29 Ia. 148; Pierce on Railroads, 246–248; *Bellinger* v. *R. Co.*, 23 N. Y. 42; *Uline* v. *R. Co.*, 101 id. 98; *Kane* v. *N. Y. E. R. Co.*, 125 id. 164; *B. P. Comrs.* v. *Armstrong*, 45 id. 234; *Lansing* v. *Smith*, 8 Cow. 146; *Story* v. *M. E. R. Co.*, 90 N. Y. 122; *Lahr* v. *M. E. R. Co.*, 104 id. 268.)

David F. Day for respondent.

ANDREWS, J. The principal question in this case respects the rights of the plaintiffs as abutting owners, to recover damages occasioned by the construction of the defendant's road in Water street in the city of Buffalo. The plaintiffs' premises are situated on the northerly side of Water street and are

bounded easterly by Commercial street, westerly by Maiden Lane, and southerly by Water street, and occupying the whole lot is a four-story brick building used as a store and residence, constructed before the railroad was placed in Water street. Water street runs easterly and westerly and has existed for more than forty years. Up to 1875, the plaintiffs owned the fee to the center of the street opposite their premises, subject to the public easement. In that year proceedings were taken by the city of Buffalo to acquire the title to a large number of streets in Buffalo, including Water street, by condemnation, and resulted in the city acquiring the title, upon payment of a uniform and nominal award of five cents damages to each of several hundred owners of lots on the streets taken including the plaintiffs.

In 1882, the common council of the city of Buffalo by ordinance granted to the defendant the right to construct and maintain two railroad tracks "along Prince street to a point midway between Hanover street and Lloyd street, thence across Lloyd street at such grade as will permit said company with a practical construction to cross Commercial street at the height fixed by the state engineer; thence to and along the center of Water street to the docks of the Delaware, Lackawanna and Western Railroad Company at the foot of Erie street." Commercial slip is a part of the Erie canal and separates Prince street and Water street, and together they form a continuous street except as it is interrupted by Commercial slip. The defendant in pursuance of the permission of the common council, and in accordance with the map and profile approved by the council, and under the direction of the city engineer, proceeded to raise the grade on Prince street so as to enable the company to cross Commercial slip by a bridge fourteen feet above the water line, the height fixed by the state engineer, and to meet this grade of the bridge constructed an embankment in the center of Water street from the bridge easterly for the distance of 300 feet, passing the plaintiff's premises. Water street is sixty-six feet wide. The sidewalk on the Water street side of the plaintiffs' lot occupies fourteen feet. The embankment of the defendant is twenty-four feet wide, and at the junction of Water and Commercial streets (at the corner of

which is the plaintiffs' lot), it is five feet, nine inches high and from that point descends westerly by a gradual descent passing the plaintiffs' lot and across Maiden Lane and reaches the original level of the street nearly 300 feet west of the corner of Commercial and Water streets. The embankment is supported laterally by solid, perpendicular stone walls, which extend along Water street in front of the plaintiffs' lot and across the entrance of Maiden Lane. Between the perpendicular stone wall on the northerly side of the embankment and the sidewalk in front of the plaintiffs' building is a space eight to nine feet wide, which is the only carriage-way left on the Water street side of the plaintiffs' premises. Commercial street extends northerly and southerly from Main street to Buffalo harbor. The raising of the embankment in Water street rendered it necessary to make an embankment in Commercial street to meet the grade of the railroad, and this was done by the defendant. The defendant paved the surface of the twenty-four feet strip in Water street occupied by its embankment, and laid thereon part of the way one track, and part of the way two tracks for the accommodation of its business. Carriages or teams cannot cross Water street in front of plaintiffs' premises. This is prevented by the embankment. Access to their premises on the Water street side from Commercial street south of Water street is also prevented except by first crossing Water street, and then passing along the embankment on Commercial street 130 feet, and then turning into the road-way on Commercial street between the embankment in that street and the sidewalk, and thence into Water street, or else, when reaching the junction of Commercial and Water streets by turning west and driving down the embankment along the railroad tracks about 300 feet to the end of the grade, and then turning and going easterly along the narrow road-way 8 or 9 feet wide on the northerly side of the embankment. This space is not sufficient to allow wagons to pass each other, nor can a single wagon with horses be turned around in this space except with difficulty.

It was conceded that the plaintiffs, up to the time of the trial, had sustained damages in the diminished rental value of

their premises by reason of the embankment in the sum of $525, for which sum a verdict was rendered, and no question now arises as to the rule of damages or the amount, provided, upon the facts, damages are legally recoverable.

The counsel for the defendant rests his claim that the judgment should be reversed upon two grounds, *first*, that the laying of tracks for the running of cars by steam on the grade of a city street, and the operation of trains thereon under legislative and municipal authority where the fee of the soil is in the municipality, violates no property rights of an abutting owner, and consequently, in the absence of a special statute authorizing compensation, he is without remedy, although his property may be injured; and, *second*, that the erection of the embankment to accommodate the street to the use of the defendant was merely a change of grade, which it was competent for the city to authorize in its discretion, and that such change of grade, although it damaged the plaintiffs' property, was within the case of *Radcliff's Ex'rs* v. *Mayor, etc.* (4 N. Y. 195) *damnum absque injuria*. The tracks, it is said, were placed on the new grade, and, therefore, on the surface of the street, and the case, it is claimed, is not distinguishable in principle from what it would have been if, without any change of grade, the tracks had been laid on the original surface of the street. There is a third subordinate defense insisted upon, viz.: That the charter of Buffalo gives a special remedy for injuries to lot owners from a change of grade of streets, and that this remedy is exclusive, and was the only one open to the plaintiffs.

The first proposition is sustained by our recent decision in *Fobes* v. *R., W. & O. R. R. Co.* (121 N. Y. 505). Prior to that decision it had been decided in *People* v. *Kerr* (27 N. Y. 188) and in *Kellinger* v. *42d Street & G. S. F. R. R. Co.* (50 id. 206), which followed it, that the laying of horse railroad tracks in the streets of the city of New York, the fee of which was in the city, was consistent with their use as public, open streets, and with the trust upon which the streets were held, and that abutting owners had no remedy for any consequential injuries they might sustain from the construction and operation under

legislative authority of a horse railroad in the street in the absence of any negligence. The case of *Williams* v. *N. Y. C. R. R. Co.* (16 N. Y. 97) was that of a steam railroad over lands previously dedicated by the owner for a street, where he retained the fee, and it was held that such a use was not within the scope of the dedication, and that the legislature could not authorize such use except on condition of making compensation to the owner of the fee. The same doctrine was applied under similar circumstances to the case of a horse railroad in *Craig* v. *Rochester City & B. R. R. Co.* (39 N. Y. 404). These latter cases, as will be observed, decide that neither a horse nor steam railroad can be authorized in streets, the fee of which is in the adjacent owner, without his consent, while the former cases hold that where the fee is in the municipality, horse railroads may be authorised against the will of the abutting owner and without making compensation. The distinction is made to rest on the location of the fee.

The case of *Fobes* v. *R., W. & O. R. R. Co.* (*supra*), presented the distinct question whether the construction of a steam surface railroad, part of a long line of railroad, on the ordinary grade of a street, under legislative authority, subjected the company to liability for consequential injuries to the lot of an abutting owner whose lot was bounded by the side of the street, and who had no title to the soil therein. It was urged on behalf of the plaintiff that the cases relating to horse railroads were not applicable by reason of their different purpose, such railroads being primarily designed for street traffic, and steam railroads such as that then in question, for ordinary railroad traffic, and also that the one by reason of the different motor, imposed a different and increased burden on the street from that imposed by the other, and interfered to a much greater extent with the enjoyment of the street by abutting owners. The opinion of Judge PECKHAM in that case contains a careful review of the street railway cases in this state, both in this court and the Supreme Court, and it was held that it had become the settled doctrine of our courts that, as against abutting owners having no title to the bed of the street, it was competent for the legislature to authorize the

construction of a steam surface railroad therein, without making compensation to the owners of the abutting property injured by such construction, and that there was no legal distinction between the case of a railroad operated by horses and one operated by steam power, and the court reversed the judgments below in favor of the plaintiff. The court in its opinion distinctly limits the doctrine to cases where the railroad is laid on the same grade as the street, leaving the street substantially free and unobstructed for ordinary travel. The learned judge, after referring to the law as established in this state on the subject, says: "The company was, therefore, not liable to such an owner for any consequential damages arising from a reasonable use of the street for railroad purposes, not exclusive in its nature, and substantially on the same grade as the street itself, and leaving the passage across and through the same free and unobstructed for the public use." And again, speaking of the cases of a steam and horse railroad, he says: "If the use of either becomes unreasonable, excessive, or exclusive, or such as would not leave the passage of the street substantially free and unobstructed, then such excessive, improper or unreasonable use would be enjoined, and the adjoining owner would be entitled to recover damages sustained by him therefrom in his means of access, etc., to his land."

It is no longer open to debate in this state that owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation. The right of abutting owners in the streets is not, however, of that absolute character that they can resist or prevent any and all interference with the street to their detriment, or which can be asserted to stay the hand of the municipality in the control, regulation or improvement of the streets in the public interest although it may be made to appear that the privileges which they had theretofore enjoyed, and the benefits they had derived from the street in its existing condition, would be curtailed or impaired to their injury by the changes proposed.

The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only that the change is made under lawful authority. This, it is held, is not a taking of the abutting owner's property, and the injury requires no compensation. The hardships arising from the application of this rule of law has led to constitutional amendments in many of the states, providing for compensation for property damaged as well as taken in the prosecution of public improvements. The general rule in this state is unchanged, but the act, chap. 113 of the Laws of 1883, and provisions in some city charters, afford similar relief in certain cases. But that there is a limitation to public powers over the streets of a city, which cannot be transgressed without invading the constitutional rights of abutting owners, was a principle announced in the *Story* case (90 N. Y. 122), and confirmed and broadened so as to apply to other circumstances in the subsequent cases. The elevated railroad structure, the subject of complaint in the *Story* case, occupied with its supports and stair-ways, portions of the street, and such occupation was necessarily exclusive, and this fact was prominently brought into view in the opinions delivered. The parts of the street so occupied could not be used for general street purposes. This fact, it is claimed, distinguishes the present case from that, and it is insisted that this case is more nearly allied to the *Fobes* case than to that of *Story*. It is true that the part of the street occupied by the embankment of the defendant is still a part of Water street. It is also true that the occupation of the embankment by the tracks of the defendant was not necessarily exclusive, that is to say, it is possible for ordinary vehicles to traverse the embankment longitudinally, but such travel would subject the traveler to the risk of meeting railway trains on the narrow causeway and he would have no opportunity to turn off the embankment, except by

driving over the perpendicular wall which supports it. The plaintiffs are practically excluded from the use of that portion of the street by the presence of the railroad there. They and their customers cannot drive across it, and if they had the temerity to drive along it, nevertheless they would be compelled to make a long circuit to reach the plaintiffs' premises from the streets south of the embankment. The only practicable roadway in front on Water street is but a few feet in width, quite insufficient for a safe and convenient way to and from their lot.

We think the public cannot justly demand such a sacrifice of private interests, or justify such an appropriation of a street by a municipality in aid of a railroad enterprise. The *Fobes* case gives no countenance to the defendant's contention. The limitations upon legislative and municipal authority, so carefully stated in the passages quoted from the opinion, are distinctly opposed to such an assumption. That case and those of *Kerr* and *Kellinger*, were cases of railroad tracks laid upon the general grade of city streets, as such grade existed when the tracks were authorized. There was no exclusive appropriation in fact of any portion of the surface by the companies, except that the rails were embedded in the soil. The whole street in each of these cases remained opened and unobstructed, except that the existence of the tracks and the operation of the respective roads thereon rendered access to the lots of the abutting owners somewhat less safe and convenient than before. Here, as the evidence tends to show, the city of Buffalo, for the convenience and presumably upon the application of the defendant, devoted the center of Water street to what is practically the exclusive use of the defendant, leaving for the use of the plaintiffs a narrow and inconvenient roadway, separated from the center of the street by a barrier therein, impassable for carriages from north to south, opposite the plaintiffs' lot on Water street, and only theoretically open from east to west, and then only by a circuitous route. It is quite probable that the general interests of Buffalo and of the larger public are promoted by this appropriation of the street, but it by no means follows that a lot owner whose property is injured should bear the loss for the public benefit. We think

the case falls within the principle of the *Story* case, and that while the law now is that it is competent for the legislature to authorize railroad tracks, either for steam or horse railroads, to be laid on the ordinary grade of streets, the fee of which is in the state or municipality, without making compensation to abutting owners for consequential injuries to their property, the legislature cannot legally authorize structures for railroad purposes to be erected therein for the use and convenience of railroads, which practically exclude the abutting owners from the part of the street so occupied, without compensating them for the injury suffered, and that it is not necessary that there should be an actual physical exclusion of the lot owners from the use of that part of the street occupied by such structures in order to entitle them to a legal remedy. It is enough if such part of the street is practically and substantially closed against them for ordinary street uses.

The power conferred by the charter of Buffalo upon the common council to "permit the track of a railroad to be laid in, along or across any street or public ground" (Laws 1870, chap. 519, tit. 3, § 19), must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded. The present controversy could not have arisen prior to 1875, when the plaintiffs were owners of the fee to the center of Water street. They would then, under the settled law, have been entitled to compensation. The city of Buffalo having in that year acquired, for a nominal consideration, the technical fee in the street, proceeded afterwards to authorize the laying of the tracks in question, and it is now claimed that this change in the title defeats the plaintiffs' right to compensation. This is probably true, if what has been done by the defendant under license of the city was simply the laying of its tracks on the surface of the street at its ordinary grade, but this was not the character of the change effected.

The second proposition of the counsel of the defendant that the building of the embankment was a mere change of grade of Water street, made under the authority of the city, is, we think, untenable. The charter of Buffalo gives plenary power to the city to fix and change the grade of streets by formal

proceedings, and provides that when a grade is established or altered, a description of such grade shall be made and recorded by the city clerk. (Charter 1870, tit. 9, §§ 1, 2, 6.) The action of the common council granting permission to the defendant to occupy Water street, while it involved as a consequence, the construction of an embankment in Water street, did not purport to be an exercise of the power to change the grade of the street under the charter. It does not appear that any description was made or recorded as is required when a new grade is established. It would be a strained construction to regard the action of the council as a change of grade of Water street under the charter provisions. The defendant desired to lay its tracks in Water street and the other streets mentioned in the grant, and to enable it to do this and cross Commercial slip an embankment in the street was authorized. The grade of Water street was not altered, but the defendant was permitted to build an embankment in the street for its railway. The fact that what was done did effect a change in the grade of that part of the street occupied by the embankment does not prove that what was done was in the execution of the power to alter the grade of streets conferred on the council. The primary object of this power contained in municipal charters, is to enable the municipal authorities to render a street more safe and convenient for public travel, to afford drainage, in short, to adapt it more perfectly for the purposes of a public way. It is claimed that the city under this power could lawfully authorize an embankment in part of the street, leaving the other part on a lower level. We are not called upon to say whether there is any limit to the exercise of municipal authority or that the city cannot in exercising the power to establish and alter the grade of streets, raise an embankment in a part of a street if, in its judgment, this will promote the public convenience and the purposes of the street as a highway. But we think it cannot under the guise of exercising this power, appropriate a part of a street to the exclusive, or practically to the exclusive use of a railroad company, or so as to cut off abutting owners from the use of any part of the street in the accustomed way, without making com-

pensation for the injury sustained. We have held that the authority conferred by the general railroad law upon railroad companies to cross highways in the construction of their lines, authorizes their construction on, over or below the grade of the highway crossed, and that incidental changes of the grade of the street rendered necessary to accommodate railroad crossings, gives no right of action to abutting owners who may sustain injury. (*Conkling* v. *N. Y., O. & W. R. R. Co.*, 102 N. Y. 107.) The practice of permitting railroads to cross highways is coeval with the introduction of the railroad system in the state, and the decision comports with the general understanding of the bench and the bar. In case of railroad crossings the highway is left as before. No part of it is taken or exclusively appropriated by the railroad company. In these cases there is no use of the highway for railroad purposes. Railroads of necessity intersect highways, and it is held that the state may permit them to be crossed by a railroad company and that this involves an invasion of no substantial right of the owner of the fee. We ought not to extend the doctrine of the crossing cases to unreasonable limits, and we think that it cannot be applied to justify the exercise of the public powers attempted in the present case. The *Ottenot* case (119 N. Y. 603) related to the right of an abutting owner on Commercial street to recover damages for the raising of the embankment on that street in front of his premises to meet the grade on Water street. The members of the court agreed that the judgment should be reversed under the *Uline* case (101 N. Y. 98) for error in the rule of damages. It was the opinion of the learned judge, who wrote in that case, that the plaintiff could not recover for two additional reasons, *first*, that, as the plaintiff "was not an abutting owner on Water street and had no rights therein," he had no right to complain of the construction of the railroad therein; and, *second*, that the raising of the embankment in Commercial street was in legal effect a change of grade by the city and, therefore, there was no actionable injury. The plaintiffs here are abutting owners on Water street and their claim is not subject to the objection made to the

claim of Ottenot in the first ground mentioned. If the second ground is tenable it must rest, we think, on the point that the plaintiff Ottenot had no right to question the legality of the structure in Water street, and, therefore, that the accommodation of the grade in Commercial street to meet the grade on Water street, was in a proper sense a change of grade for street purposes. The *Ottenot* case does not, we think, control the present one, and assuming that the embankment on Commercial street could be regarded as a change of grade under charter powers, the embankment on Water street cannot be so regarded.

The point that the charter confines the plaintiffs to a remedy against the city, is based upon a provision of the charter (Tit. 9, § 17) that "when the city shall alter the recorded grade of any street or alley, the owner of any house or lot fronting thereon may within one year thereafter claim damages by reason of such alteration." The conclusion we have reached, that the action of the city in granting permission to the defendant to construct an embankment in Water street, was not a change of grade in the street within the charter provisions, disposes of this question. The charter provision was intended to afford a remedy for damages from changes of grade where none existed before, and to cases to which it applies, the remedy is necessarily exclusive. (*Heiser* v. *Mayor, etc.*, 104 N. Y. 68.) Here the plaintiff as we hold has a common-law remedy for his injury, and this is not cut off by the provision in the charter.

We think the judgment should be affirmed.

GRAY, J. I concur with Judge ANDREWS. In Judge EARL's opinion in the *Ottenot* case (119 N. Y. 603), in which I also agreed, the street, a portion only of the grade of which was changed by raising, was not subjected to or burdened by other uses. It remained as much as ever in other respects an ordinary street. The change of the grade was in the general public interests, and the moving cause for the change did not affect the complexion of the question in the case. The plaintiff's property in that case did not abut upon Water street, and he had no right to complain of the railroad structure or

Statement of case.

embankment in question. Here the object was to subserve the railroad use, and the appropriation by the defendant of this embankment is practically exclusive. The street was subjected to a new use, with consequences as direct, in the permanent deprivation of the abutting property owners' appurtenant easement, as though the railroad was operated in front of his premises upon a structure physically incapable of other uses. I think we have, in the present case, the element of an appropriation by the defendant of the street by a permanent structure and obstruction, and, hence, it must fall within the spirit, if not the letter, of our decision in the *Story* case.

All concur, except EARL and FINCH, JJ., dissenting.

Judgment affirmed.

RACHAEL S. LYNK, by Guardian, etc., Respondent, *v.* CHARLES WEAVER, Appellant.

In the provision of the Code of Civil Procedure (§ 738), authorizing an offer of judgment by a defendant and providing that if plaintiff does not serve notice of acceptance and "fails to obtain a more favorable judgment, he cannot recover costs from the *time of the offer*, but must pay costs from that time," the words "time of the offer" mean "date of the offer;" it speaks as of the date when it was made.

Defendant offered judgment for a certain amount, "with costs to date;" the offer was not accepted. Plaintiff recovered judgment for less than the amount offered, but was allowed costs on the ground that the offer was a nullity and did not protect defendant against costs subsequent to the offer, because of the addition of the words "to date," as plaintiff, in case of acceptance, would have been obliged to incur the fees for entry of judgment. *Held*, error; that the costs of judgment were a portion of the costs "to date," and that those words were mere surplusage.

Under the provision of the Code of Civil Procedure (§ 3228), specifying the cases in which a plaintiff is entitled to costs, all actions for trespasses on lands, so far as costs are concerned, stand on the same footing, and in an action for the recovery of treble damages, as well as in other actions of trespass where the title to the premises is not put in issue, if plaintiff recovers less than fifty dollars damages, not he, but the defendant is entitled to costs. (§ 3229.)

The clause in said provision giving to plaintiff costs on recovery of judgment, irrespective of amount. "where a claim of real property arises on the pleadings," refers to a case where plaintiff's title is disputed by the answer.

Statement of case.

No claim of title arises in an action of trespass on lands upon a mere assertion of title in the complaint, which is not denied by the answer, and in such case plaintiff, upon a recovery of less than fifty dollars, is not entitled to costs.

Such an action is one to recover damages for "an injury to property" (Code Civ. Pro. § 2862), and so, unless the title is put in issue, is one of which a justice of the peace can take cognizance.

(Submitted June 1, 1891; decided October 6, 1891.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 12, 1890, which affirmed an order of Special Term denying a motion for a retaxation of costs.

The plaintiff brought this action in the Supreme Court to recover damages for injuries to her real estate, and she recovered a verdict for thirty dollars. Both parties claimed the costs of the action and the clerk taxed them in favor of the plaintiff.

The facts, so far as material, are stated in the opinion.

Simon Calkins for appellant. The only pleadings in this action are the complaint and the amended answer. (Code Civ. Pro. § 542; *S. C. Bank* v. *Garlinghouse*, 4 How. Pr. 174; *Hinkley* v. *T. & A. R. R. Co.*, 42 Hun, 281; *Kline* v. *Cary*, 18 id. 524; *Ostrander* v. *Conkey*, 20 id. 421.) No claim of title to real property arises upon the pleadings in this action. (Code Civ. Pro. § 1645; *Koon* v. *Mazuzen*, 6 Hill, 45; *Wickham* v. *Seeley*, 18 Wend, 649; *Crowell* v. *Smith*, 35 Hun, 182; *Bailey* v. *Daigler*, 50 id. 538; *Kelley* v. *N. Y. & M. B. R. R. Co.*, 18 id. 363; 81 N. Y. 233; *Heintz* v. *Dellinger*, 28 How. Pr. 39; *Turner* v. *Van Riper*, 43 id. 33; *Burnet* v. *Kelley*, 10 id. 406; *Main* v. *Cooper*, 25 N. Y. 180, 184; *Dunster* v. *Kelley*, 110 id. 558; *Craven* v. *Price*, 37 How. Pr. 15.) The defendant is entitled to costs of course in this action. (Code Civ. Pro. §§ 2514, 2862, 2951, 2956, 2957, 3228, 3229; *Reilly* v. *Davies*, 4 Santv. 722; *Broughton* v. *Wellington*, 10 Wend. 566; *Sturgis* v. *Spofford*, 58 N. Y. 103; *Clow* v. *Van Loan*, 4 Hun, 184; *Adams* v. *Rivers*, 11 Barb. 390; 6 Hill, 45; 18 Wend. 649.) The appellant's objections before the clerk to the adjustment of costs for the

respondent should have prevailed. (*Turner* v. *Van Riper*, 43 How. Pr. 33.) In any event the defendant is entitled to costs after the offer of judgment for seventy-five dollars, with costs to date, the recovery being but thirty dollars. (Code Civ. Pro. § 738; *Magnin* v. *Dinsmore*, 15 Abb. Pr. [N. S.] 331.) The orders of the Special and General Terms of the Supreme Court should be reversed, the judgment vacated, a new taxation of costs ordered, with costs and printing disbursements. (*Jones* v. *Cook*, 11 Hun, 230.)

Alonzo P. Strong for respondent. It was necessary for the plaintiff to allege as a substantive part of her action title in fee to the *locus in quo*. A "claim of title to real estate arises upon the pleadings," therefore, within subdivision 1, section 3228 of the Code of Civil Procedure, and the plaintiff is entitled to costs as a matter of right, independent of the amount of the recovery. (*Edwards* v. *Noyes*, 65 N. Y. 125; Code Civ. Pro. §§ 1665, 3228; *O'Reilly* v. *Davies*, 4 Sandf. 723; *Niles* v. *Lindsley*, 8 How. Pr. 131; *Snyder* v. *Beyer*, 3 E. D. Smith, 255; *Burnet* v. *Kelly*, 10 How. Pr. 406; *Rathbone* v. *McConnell*, 21 N. Y. 466; *Squires* v. *Seward*, 16 How. Pr. 478; *Van Dusen* v. *Young*, 29 N. Y. 9; *Kelly* v. *N. Y. & M. B. R. R. Co.*, 81 id. 233; *Cornell* v. *Smith*, 35 Hun, 182; *Kunster* v. *Kelly*, 110 N. Y. 558; *Glackin* v. *Zellar*, 52 Barb. 147; *Bradner* v. *Howard*, 14 Hun, 421; 75 N. Y. 417; *White* v. *Place*, 40 Hun, 481; *Sherry* v. *Cary*, 111 N. Y. 514.) The offer of judgment in this case was for seventy-five dollars with costs to the date of the offer. Such an offer is a nullity, and confers no right to costs subsequently accruing, though the recovery be less than the amount offered. (*Leslie* v. *Walrath*, 45 Hun, 18; *McFarren* v. *St. John*, 14 id. 387; *Riggs* v. *Waddell*, 88 N. Y. 586.)

EARL, J. The plaintiff, in her complaint, alleged that she was seized of certain land, subject to an estate in her mother, who was entitled to the use and possession of the same during her minority, and that the defendant wrongfully and unlawfully entered upon the land and cut and removed therefrom

certain trees of the value of three hundred dollars, and thus diminished her inheritance to that amount, and she claimed that the defendant had thus forfeited to her under the statute and become liable to pay her treble the amount of such damages, and she demanded judgment for $900. The defendant, in his answer, expressly admitted plaintiff's title and all the allegations in the complaint in reference thereto, and alleged that he had entered into a contract with the owner of adjoining land to cut trees thereon; that there was no fence or perceptible division line between such land and her lands, and that while he believed he was cutting trees upon such adjoining land he casually and involuntarily cut trees over the boundary line upon her land, and that the trees he thus cut did not exceed in value $35. At the same time with his answer he served upon her attorney, in writing, an offer to allow judgment to be entered against him "for seventy-five dollars, besides costs to date." This offer her attorney declined to accept, and the action was brought to trial at a Circuit Court. The litigation at the trial was confined to the amount of damages, and to the question whether the trespass was willful or casual and involuntary. Two questions were submitted to the jury and answered by them: (1) "What was the actual damage done by the defendant to the plaintiff's estate in the land described in the complaint by the cutting and removing wood and timber therefrom at the times mentioned in the complaint?" Answer. "Thirty dollars." (2) "Was such cutting and removal casual and involuntary?" Answer. "Yes." Upon this verdict judgment was entered against the defendant for the thirty dollars, and $129.93 costs.

It is thus seen that the defendant has had a hard measure of justice. He defeated the plaintiff upon all the issues tried. She claimed nine hundred dollars damages against him. He did not deny in his answer that he had done her some damage, but alleged that it did not exceed thirty-five dollars, and he offered her judgment for seventy-five dollars. She recovered only thirty dollars, and yet he has thus far been held liable for all the costs.

Opinion of the Court, per EARL, J.

The court below held that the offer of judgment given by the defendant was a nullity and did not protect him against the costs subsequent to the offer because he added at the end thereof the words "to date," and that thus the plaintiff, if she had accepted the offer, would have been obliged to incur the expense of fifty cents for the entry of judgment upon the offer. This is an erroneous view. The plaintiff could at once have accepted the offer and have entered judgment on the same day and could then have taxed the expense of entering the judgment. The cost of entering the judgment was a portion of the costs "to date." The words "to date" were mere surplusage, and they add nothing to the force and effect of the offer. This appears quite plain by reference to section 738 of the Code, under which the offer was made. The last clause of that section is as follows: If "the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time." If the plaintiff in such a case declines to accept the offer and does not obtain a more favorable judgment, the time of the offer is the dividing line as to costs. Obviously the words "time of the offer" mean the same as the "date of the offer." When a defendant offers judgment "with costs," the offer speaks as of the time or date when it is made, and the plaintiff in such a case cannot recover costs from that time or date, but must from that time or date pay the costs. The defendant's offer was, therefore, an effectual offer, and adequate to protect him against costs. and to entitle him to costs from that time or date.

But we must go further. The plaintiff was not entitled to any costs, because her recovery was less than fifty dollars, and the defendant was entitled to all the costs of the action.

It was provided in the Revised Statutes (2 R. S. 613, § 3, subdivisions 1 and 2) that the plaintiff recovering judgment should recover costs as follows: (1) "In all the actions relating to real estate enumerated in the fifth chapter of this act, and in all proceedings to recover the possession of land forcibly entered or detained. (2) In all actions in which the title to

lands or tenements, or a right of way, or a right by prescription or otherwise to any easement or any land, or to overflow the same, or to do any other injury thereto, shall have been put in issue by the pleadings, or shall have come in question on the trial of the cause." Among the actions enumerated in the fifth chapter referred to are actions "of trespass on lands for the recovery of treble damages." Notwithstanding these provisions, it was held in *Wickham* v. *Seely* (18 Wend. 649) that a plaintiff in an action of trespass *quære clausum fregit*, prosecuted in the Supreme Court — not under the statute giving treble damages — recovering less than fifty dollars damages, was not entitled to costs, but was bound to pay costs to the defendant, although the *locus in quo* was uninclosed, unoccupied and uncultivated, because the defendant did not put his title in issue. The effect of that decision was that in all actions of trespass, where treble damages were not claimed, the defendant would recover the costs of the action if he did not put in issue the plaintiff's title, although the plaintiff alleged title in his complaint, unless the plaintiff recovered at least fifty dollars. The action of trespass on lands to recover treble damages was the only exception to the rule that where a plaintiff could commence and try his action in Justices' Court, and yet commenced his action in the Supreme Court, he was obliged to recover at least fifty dollars to entitle him to costs. The distinction as to costs between ordinary actions of trespass on lands and trespass to recover treble damages no longer exists. All actions for injuries to lands now, as to costs, stand on the same footing, and the scheme and policy of the law are absolute that the plaintiff shall not recover costs in the Supreme Court in any case where he could have commenced and tried his action in a Justice's Court, unless his recovery shall be at least $50.

In the Code of 1848, subdivision one of section 259 was substituted and made to embrace the substance of subdivisions one and two of the sections of the Revised Statutes above quoted, and it gave the plaintiff costs "in an action for the recovery of real property, or where a claim of title to real

property arises on the pleadings or is certified by the court to have come in question at the trial." The same provision is now found in subdivision one of section 3228 of the Code as follows: "An action triable by a jury to recover real property or an interest in real property, or in which a claim of title to real property arises on the pleadings or is certified to have come in question upon the trial." Under the Revised Statutes the requirement was that the plaintiff's title must have been "put in issue by the pleadings." Now the requirement is that a claim of title must "arise upon the pleadings." We think the meaning in both cases is substantially the same. The provision in the Code is a mere revision of the prior law, and in such a case a mere change of phraseology must not be deemed or construed to change the law unless it evidently appears that such was the intention of the legislature. (*Taylor* v. *Delancy*, 2 Caine's Cases, 143; *Goodell* v. *Jackson*, 20 Johns. 693; *Matter of Brown*, 21 Wend. 316; *Hall* v. *Western Trans. Co.*, 34 N. Y. 284.)

It has never, prior to the decision now under review, been decided in any case, either under the Revised Statutes or under the Code, so far as we can find, that a plaintiff can recover his costs in the Supreme Court in an action of trespass on lands where the allegation of title in his complaint is admitted, or not put in issue by the answer, unless his recovery be at least fifty dollars. On the contrary, the decisions are uniform to the effect that in such a case he cannot recover the costs, but the defendant can. (*O'Reilly* v. *Davies*, 4 Sandf. 723; *Snyder* v. *Beyer*, 3 E. D. Smith, 235; *Niles* v. *Lindsley*, 8 How. Pr. 131; *Burnet* v. *Kelly*, 10 id. 406; *Squires* v. *Seward*, 16 id. 478; *Utter* v. *Gifford*, 25 id. 289; *Earl of Craven* v. *Price*, 37 id. 15; *Turner* v. *Van Riper*, 43 id. 33; *Lillis* v. *O'Conner*, 8 Hun, 280; *Learn* v. *Currier*, 15 id. 184; *Green* v. *Trustees, etc.*, 30 id. 306; *Crowell* v. *Smith*, 35 id. 182; *Bailey* v. *Daigler*, 50 id. 538; *Kelly* v. *N. Y. & M. B. R. R. Co.*, 81 N. Y. 233; *Dunster* v. *Kelly*, 110 id. 558.) These cases all involved the construction of the language contained in subdivision 1 of section 3228, and the meaning of the phrase "a claim of

title to real property arises upon the pleadings," and they determine beyond any question that a claim of title does not arise by the mere assertion of title in the complaint, even in a case where, if the title were disputed, it would be incumbent upon the plaintiff to prove it at the trial. A claim of title in the complaint is not a claim of title upon the pleadings. Where, viewing all the pleadings, there is no issue or dispute about the title, in no legal sense can it be said that a claim of title arises upon the pleadings. The phrase has reference to a case where both parties in the pleadings claim the title, or where one claims it and the other disputes it. This construction of the phrase preserves the historic continuity of the law and enforces the policy of the law which seeks to compel a plaintiff in cases where his claim is under fifty dollars to sue in a Justice's Court in all cases where that court has jurisdiction.

It is not disputed that this action upon these pleadings could have been commenced and tried in a Justice's Court. The law prohibits justices from trying and determining disputed titles to real estate. Here there was no dispute about the title. That was admitted, and the question of damages was really the only one to be tried and determined. The action was to recover damages for an injury to property. (Code, § 2862, subd. 2.)

The counsel for the plaintiff thinks great inconvenience and injustice may flow from the holding that the plaintiff cannot recover costs in such a case as this, and he calls our attention to section 2956 of the Code, which provides for a case where the action for an injury to real estate is commenced in a Justice's Court and the defendant does not interpose a plea of title and give the undertaking required in such a case. The section is as follows: "If, however, it appears upon the trial, from the plaintiff's own showing, that the title to real property is in question and the title is disputed by the defendant, the justice must dismiss the complaint with costs and render judgment against the plaintiff accordingly." His claim is that in the cases contemplated by this section the defendant may dispute the title of the plaintiff and thus oust the justice from jurisdiction, and then when the plaintiff commences his action

Opinion of the Court, per EARL, J.

in the Supreme Court admit his title and thus impose the costs there upon him. Of course, if that could be done in a case like this, there would be a mischief unprovided for by the law. We do not now determine whether the practice suggested by the plaintiff's counsel could be successfully pursued by a defendant in such a case as this. We are, however, inclined to the opinion that it could not be, and that when such a case arises it will be found that the difficulty suggested does not exist. It is sufficient to say now that this is not such a case. Here the plaintiff did not in the first instance commence her action in a Justice's Court. If, however, we should uphold the plaintiff's contention in this case, injustice would result in another direction. Then the plaintiff could generally, in action of trespass, by alleging in his complaint title as the basis of his action, maintain that a claim of title arose on the pleadings and could thus, for any trivial trespass where he knew there was no dispute about his title, recover costs in the Supreme Court, and this could always be done when the trespass related to unoccupied, vacant lands not in the actual possession of the plaintiff. The conclusion which we have reached is supported by the plain meaning of the statute, and by the general policy of the law.

The orders of the General and Special Terms should be reversed and the motion granted, with costs of the appeals to the General Term and to this court, and ten dollars costs of the motion.

All concur.

Orders reversed.

Statement of case.

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THE PEOLPE ex rel. JETTIE DANZIGER, Respondent, *v.* THE PROTESTANT EPISCOPAL HOUSE OF MERCY of the City of New York, Appellant.

In re Custody of MOLLIE DANZIGER.

Where, in proceedings by habeas corpus, it appears that the person is held in custody under a commitment issued by a magistrate, the only inquiry is whether the magistrate had jurisdiction of the case and authority to pronounce the judgment rendered for the cause assigned.

The decision of the magistrate may not be reviewed, and so, it is not essential to return the evidence on the trial. (Code Civ. Pro. §§ 2032, 2034.)

If the process be valid on its face, the burden of impeaching its validity rests upon the prisoner.

Under the provision of the Code of Civil Procedure in reference to proceedings on the filing of a traverse to a return to a writ of habeas corpus (§ 2039), the return is to be assumed to be true, except in so far as its material allegations are controverted by the traverse.

The portion of such provision requiring the court or judge before whom the prisoner is brought to proceed in a summary way to hear the evidence, has no application unless the material allegations showing jurisdiction are controverted by a proper traverse.

By the return to a writ of habeas corpus, it appeared that the prisoner was held by defendant, one of the institutions named in the act of 1886 (Chap. 353, Laws of 1886), amending the Consolidation Act for the city of New York, by virtue of a commitment issued by a police justice of that city. The commitment stated that the prisoner was a female under sixteen years of age; that she was brought before the magistrate by a policeman, who charged upon his oath that she was found in a reputed house of prostitution, and was in danger of becoming morally depraved; that she confessed and was convicted of the charge and committed to the guardianship of the institution. *Held*, that the commitment was in substance and form sufficient to show jurisdiction of the person of the prisoner and of the subject-matter of the complaint, as given by said act.

The petitioner for the writ undertook to traverse the return by filing a verified statement in which she averred that the prisoner was her daughter, and previous to her arrest resided with petitioner; that neither the petitioner nor, as the petitioner is informed and believes, the prisoner was examined before the magistrate, nor was any evidence given to show that the house wherein the latter was found was a reputed house of prostitution, or that she was an inmate thereof and in danger of becoming morally depraved. *Held*, that the traverse failed to controvert any of the material facts stated in the return, or to avoid them by extrinsic matter; that while it would have been competent for

the petitioner to have disputed the facts upon which the jurisdiction of the magistrate was predicated, or to have alleged extrinsic facts tending to show want of jurisdiction, in the absence of such allegations it was the duty of the judge to remand the prisoner.

(Argued June 4, 1891; decided October 6, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 13, 1891, which reversed an order of Special Term discharging the petitioner from custody.

The nature of the proceedings and the material facts are stated in the opinion.

A. & C. Steckler for relator. The complaint was the foundation of the proceedings against the respondent, and cannot be used as evidence nor to substantiate charges made against her. The complaint must be sustained by legal evidence. (*People* v. *Fuller*, 17 Wend. 211.) The commitment by the magistrate and his adjudication that she was an inmate of a reputed house of prostitution, and in danger of becoming morally depraved, was not made according to the statutes nor to the laws of the state of New York. (Code Crim. Pro. §§ 196, 197, 198, 199, 200.) Under the Penal Code (§ 291, subd. 2), authorizing the commitment of children "not having any home or other place of abode, or proper guardianship," the guardianship contemplated is not the mere temporary supervision of a companion in the street, and the commitment is not authorized by reason of the child being found with an improper person on a single occasion, where its parents have a home with proper surroundings. (*People ex rel.* v. *N. Y. C. Protectory*, 44 Hun, 526; 19 Abb. [N. C] 142.)

Elbridge T. Gerry and *Courtland V. Anable* for defendant.

RUGER, Ch. J. The sole question in this case is whether the defendant, a benevolent institution, had *legal authority* for detaining Mollie Danziger, a female infant over the age of twelve years, committed to its custody by a police justice of the city of New York.

Opinion of the Court, per RUGER, Ch. J.

The question arose upon returns made by the defendant and committing magistrate to a writ of habeas corpus and certiorari. The undisputed evidence showed that Mollie Danziger, a female infant of the age of sixteen years, was arrested on the 8th day of August, 1890; and was brought before Andrew J. White, a police justice of the city of New York, on the tenth day of August thereafter, and tried for the offense of being found in a reputed house of prostitution, and in danger of becoming morally depraved, and was convicted of the charge and committed to the Protestant Episcopal House of Mercy of New York, by such magistrate, to remain under the guardianship of said institution during her minority; unless sooner discharged by the trustees or managers thereof. The act under which such conviction was had, read as follows: "Whenever any female over the age of twelve years shall be brought by the police, or shall voluntarily come before a committing magistrate in the city of New York, and it shall be proved to the satisfaction of such magistrate *by the confession of such female*, or by competent testimony, that such female is found in a reputed house of prostitution or assignation, * * * and in danger of becoming morally depraved, * * * such magistrate may thereupon commit such female to the Protestant Episcopal House of Mercy of New York, * * * and said institution is authorized to receive and hold females committed under this act." It was also provided that "every commitment made under this act shall state the name and age of the female so committed, together with the cause of her commitment, and shall designate the institution to which she shall be committed, * * * and such commitment shall also state the term of the commitment, * * * provided, however, that no commitment made under the act, which shall recite the facts upon which it is based, shall be deemed or held to be invalid by reason of any defect or imperfection in form." (Chap. 353, Laws of 1886.)

Writs of habeas corpus and certiorari were duly issued and served upon the defendant, and the committing magistrate requiring them respectively to make return of the time and cause

of the imprisonment and detention of the said Mollie Danziger to a justice of the Supreme Court. The said defendant made return to such writs, that it had the said Mollie Danziger in custody by virtue and authority of the mandate of ANDREW J. WHITE, a police justice of the city of New York, a copy of which was attached to said return. This commitment was substantially in the following words: WHEREAS, Mollie Danziger, a female of the age of sixteen years, was, on the 10th day of August, 1890, duly brought before me, charged before me upon the allegation under oath of Thomas J. Crystal, that the said female, Mollie Danziger, on the 8th day of August, 1890, at the city and county aforesaid, was found in a reputed house of prostitution situated at 119 Mulberry street in said city of New York, and is in danger of becoming morally depraved. And I, having in due form of law examined said complainant and the witnesses before me produced, and also the said female, who was duly produced for my personal inspection pursuant to law, and it appearing and having been proven to me to my satisfaction, by competent testimony and evidence, *and by the confession of such female*, that she was of the age of sixteen years, and was, on the day aforesaid, found in a reputed house of prostitution at number 119 Mulberry street, in said city of New York, and was in danger of becoming morally depraved, Now, therefore, I do adjudge that the allegations set forth and stated to have been proved are true, and that it is for the welfare of said female that she be placed in a reformatory; and she is, therefore, commanded to be delivered into the custody of the said Protestant Episcopal House of Mercy, to be and remain in its custody during her minority, unless sooner discharged by the trustees or managers thereof. This commitment was signed by the said justice under his hand and seal.

The justice also made return to the writs, wherein he stated that on said 10th day of August, 1890, "I examined orally the said complainant and the witnesses before me produced in due form of law, and also the said child who was duly produced for my personal inspection, and it then and there appeared, and was conclusively proven to my satisfaction by

competent testimony and evidence, that the material allegations set forth and charged in said complaint were true, and that thereupon I did so adjudge and did commit said child by official commitment."

A copy of said complaint was also returned, whereby it appeared that Thomas J. Crystal was duly sworn on said 10th day of August, 1890, and deposed and testified that he belonged to the 6th precinct police, and that on the 8th day of August, 1890, at the city of New York, in the county of New York, one Mollie Danziger, now present, being a female actually and apparently over the age of twelve years and under the age of twenty-one years, to wit, of the age of sixteen years, was, by deponent, found in a reputed house of prostitution at No. 119 Mulberry street in said city of New York, and is in danger of becoming morally depraved. This deposition was signed by said Crystal, and purported to be sworn to before said magistrate at said trial.

The counsel for the petitioner makes several points as to the sufficiency of the return to authorize the imprisonment of the accused female, and, among other things, claims that the evidence given before the justice on the trial should have been returned, and that the language of the confession made by the prisoner should have been incorporated in the return. He also claims that the evidence of the witness Crystal was insufficient as to the reputation of the house in which he found the accused, or that she was in danger of becoming morally depraved, because the facts upon which his evidence was predicated were not returned.

The character of the argument addressed to this court seems to indicate that the counsel for the petitioner supposed that the return to a writ of habeas corpus assimilated that required by a certiorari to review, and that the evidence taken on the trial should be returned. These proceedings, however, are radically different; the one being instituted for the purpose of determining whether a person detained in custody is held by legal authority, and the other for the purpose of reviewing the determinations of subordinate tribunals in a judicial proceeding.

In habeas corpus the only inqury is whether the magistrate issuing process had authority to pronounce a judgment of imprisonment for the cause assigned, and if this has been shown the statute forbids the judge to review the decision of such magistrate. (*People ex rel. Tweed* v. *Liscomb*, 60 N. Y. 570.)

A brief reference to the powers of a judge on habeas corpus proceedings goes far to determine the merits of this controversy. The Code of Civil Procedure provides that when it appears, among other things, that the prisoner is detained in custody "by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction," and the time for which he is required to be retained has not expired, the court must remand him. (§ 2032.) Section 2034 of the same Code enacts that the court or judge is prohibited in such case, on a return to the writ, from inquiring into the legality of any mandate, judgment, decree or final order.

Referring to these requirements, it was said by Judge ALLEN, in the celebrated case of *People ex rel. Tweed* v. *Liscomb* (60 N. Y. 571), to be the consensus of all the authorities that "as well at common law as under the statutes of the state, if the party is detained on process, the existence and validity of the process are the only facts in issue, and the right to inquire into the validity of the process is co-extensive with that which is allowed in an action for false imprisonment. If the process is valid on its face, it will be deemed *prima facie* legal, and the prisoner must assume the burden of impeaching its validity by showing a want of jurisdiction. * * * If the judgment is merely erroneous, the court having given a wrong judgment when it had jurisdiction, the party aggrieved can only have relief by writ of error or other process of review." This court also held in *People ex rel. Van Riper* v. *New York Catholic Protectory* (106 N. Y. 604) that a summary conviction by a police magistrate, under section 291 of the Criminal Code, cannot be set aside on habeas corpus or certiorari on averments and proof that the fact proved before the magistrate on which the conviction depended were not true.

It seems clear, therefore, that the only question before the

judge on the return to this writ, was whether the magistrate executing the commitment had jurisdiction of the case and authority to pronounce the judgment rendered. An inspection of the returns and the accompanying documents shows, we think, conclusively that the jurisdiction of the magistrate over the person of the offending female and the subject-matter of the complaint was fully demonstrated, and that the commitment was, in substance and form, sufficient and correct to show such jurisdiction and the legality of this proceeding. It was thereby shown that the accuser was a female of the age of sixteen years, and was brought before the magistrate by a policeman of the city of New York, and was there charged upon his oath with being found in a reputed house of prostitution in New York, and was in danger of becoming morally depraved; that the female confessed the charge, and that her conviction followed. The statement in the commitment conformed strictly to the proof in the case and made a case that was brought clearly within the language and spirit of the statute. It cannot admit of question but that the commitment was sufficient to protect the defendant from an action for false imprisonment at the suit of the prisoner, or that it required the judge on the hearing to refuse her discharge, unless some of the material facts stated in the return were traversed or avoided by the petitioner. The petitioner did undertake to traverse the returns and, in pursuance of that purpose, filed a verified statement, in which she averred: "First. That the said Mollie Danziger is your petitioner's daughter (and) by and up to the time of her arrest resided with your petitioner at No. 189 Clinton street in the city of New York. Second. Further answering upon information and belief, she alleges that (neither) the said Mollie Danziger nor your petitioner were examined by the police magistrate, before whom the said Mollie was brought, nor was any evidence offered to show that the house No. 119 Mulberry street is a reputed house of prostitution, or that the said Mollie was an inmate thereof and that she was in danger of becoming morally depraved." The proceedings before a judge, on the filing of a traverse, are

regulated by section 2039 of the Code of Civil Procedure, which reads as follows: "A prisoner produced upon the return of a writ of habeas corpus may, under oath, deny any material allegation of the return or make any allegation of fact, showing either that his imprisonment or detention is unlawful or that he is entitled to his discharge. Thereupon, the court or judge must proceed, in a summary way, to hear the evidence produced in support of or against the imprisonment or detention, and to dispose of the prisoner as the justice of the case requires." The plain implication from this section is that the return is to be assumed to be true, except in so far as its material allegations are controverted by the traverse. An examination of the traverse in this case fails, we think, to show that any of the material facts stated in the return were either controverted or avoided by extrinsic matter. It is true the traverse alleges that the offending female resided with her mother up to the time of her arrest; but this allegation, if true, does not necessarily controvert the finding of the committing magistrate that she was also found in a reputed house of prostitution and was in danger of becoming morally depraved. That she might legally have resided in one place and have been found in another for improper purposes is not only quite possible, but is probably a very frequent occurrence in the history of prostitution in large cities. Even if it could be regarded as an argumentive denial of the fact that the accused was found in a reputed house of prostitution, it would still be open to the objection that it was an effort to retry the issue already determined by the committing magistrate upon competent evidence.

The traverse also alleged that neither Mollie Danziger nor the petitioner was examined before the police magistrate. It was, of course, unnecessary that either of these parties should be examined on the trial. It was the duty of the magistrate to read the charge to the prisoner and hear her plea to the charge, and the return impliedly states that this was done and certifies that she confessed the charges made in the complaint. There is no denial of this fact and, under the statute, such con-

fession is, of itself, sufficient to sustain the judgment rendered in this case. We do not think the allegation, on information and belief, that she was not examined (obviously as a witness) is sufficient to raise an issue as to the fact of confession which she made as a party to the proceeding.

The further allegations of the traverse are to the effect that, as the petitioner is informed and believes, there was no evidence offered to show that the house, No. 119 Mulberry street, was a reputed house of prostitution, or that the said Mollie was an inmate thereof. This allegation referred simply to the proceedings on the trial and did not in any way tend to contradict the jurisdictional facts stated in the return. The facts that Crystal in his deposition stated it to be a reputed house of prostitution, and that the prisoner confessed it to be such, and that she was found therein, were each and all wholly uncontroverted. That she was in danger of becoming morally depraved followed as a necessary inference from the other facts proven. The traverse is carefully worded, and whatever impression it was intended to convey, it, in law, amounts simply to an assertion that, in the opinion of the petitioner, there was no evidence given on the trial authorizing a conviction. In the face of the distinct statement of the return that the offending female confessed the charge, and the direct evidence of the policeman making the arrest to the jurisdictional facts, we do not think this equivocal and ambiguous statement is entitled to be considered as a denial of the facts returned.

If it was intended by the petitioner, by this allegation, to bring in question the sufficiency or competency of the evidence offered in support of the conviction before the magistrate, as the argument seems to import, a writ of certiorari for review should have been obtained, which would have required a return of the evidence taken on the trial. But this course was not taken, and a review of the conviction on the merits is not permitted by this proceeding.

As it was, no evidence was offered by either party on the return of the writ, and the argument of the case proceeded before the judge without objection on either side. It was

assumed by the court and the parties that no other traverse of the return could be made, and the judge decided the application upon the papers then before him and ordered the accused to be discharged from custody. The case was treated as though a demurrer to the traverse had been interposed, or in some form as though questions of law were alone involved in the decision of the application.

We are of the opinion that the order of the judge was erroneous, and that it having been established by the conceded facts that the prisoner was held under the final judgment of a competent tribunal of criminal jurisdiction under the express provisions of the Code, she should have been remanded. The writ issued in this case did not call for a return of the evidence given on the trial, as it required the defendant therein to return only the day and cause of the imprisonment, and this requirement was sufficiently complied with by a return of a proper and sufficient warrant of commitment alone. If a warrant thus returned showed the jurisdiction of the officer making it to render the judgment described therein, it was sufficient under the requirements of the statute. It would, of course, have been competent for the petitioner in such case to have disputed the facts upon which the jurisdiction of the magistrate was predicated, or to have alleged extrinsic facts tending to show the want of jurisdiction on his part to render the judgment; but in the absence of such allegations in the traverse, it was the plain duty of the judge to remand the prisoner. Section 2039, requiring the judge to proceed in a summary way to hear the evidence, has no application, unless the material allegations of the return showing jurisdiction are controverted by a proper traverse. When that is done, the requirement is imperative and imposes upon the judge the duty of hearing the evidence of the parties in respect to the issues made.

For the reasons stated, we think the orders of the General and Special Terms should be reversed and the prisoner remanded to the custody of the defendant.

All concur.

Orders reversed.

Statement of case.

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CORNELIA GILMAN, Respondent, v. PREBLE TUCKER, Appellant.

The legislature has no power to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief; the denial of a remedy for the wrong inflicted deprives him of his property as effectually as if it had been taken from him by direct legislative enactment.

A statute which assumes to destroy or nullify a party's muniments of title is as effective in depriving him of his property as one which bestows it directly upon another.

So, also, authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional prohibition as when it attempts to do the same thing directly.

A statute which provides for an involuntary transfer of property from one person to another without due process of law, whether with or without compensation, is unconstitutional, whatever may be the pretext upon which it is founded.

After judgment has been rendered in an action, the fruits thereof are rights of property, and are beyond the reach of legislative power to affect.

The provision of the Code of Civil Procedure (§ 1440) relating to the title to real property sold on execution, as amended in 1881 (Chap. 681, Laws of 1881), which provides that if the title of the sheriff's "grantee or his assignees is adjudged for any reason or cause whatever to be null and void in any action for that purpose brought by the judgment debtor or his assignees, such judgment shall have no force or effect unless within twenty days after the entry" or in case of pending appeal, within twenty days after final judgment "the plaintiff shall pay to such grantee or his assignees the * * * money * * * paid on the sale, with interest from the time of the sale, * * * including the costs and expenses of defendant in defending the action, * * * and in the event of the plaintiff's failure to pay such purchase-money and expenses within the time aforesaid, said title shall be valid in said grantee," is unconstitutional and void; it violates the constitutional prohibition against depriving the owner of his property without due process of law, and it assumes to nullify a final and unimpeachable judgment. It is also objectionable by reason of the ambiguity of the provision relating to the time limited for making the payments required by it.

(Argued June 4, 1891; decided October 6, 1891.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made the first Monday of

Statement of case.

December, 1890, which affirmed an order of Special Term denying a motion by defendant for an order declaring the judgment obtained in the above-entitled action of no force and effect.

The facts, so far as material, are stated in the opinion.

Esek Cowen for appellant. In all cases where a judgment is wholly or partially paid, or where, for any reason, it is void, and it would be unjust and inequitable to collect it, the proper remedy is, by motion in the court in which it was rendered, either to vacate or cancel the judgment, or for a perpetual stay of execution. (*Vilas* v. *P. & M. R. R. Co.*, 123 N. Y. 451; *Roach* v. *Duckworth*, 95 id. 391.) Section 1440 of the Code of Civil Procedure protects any person who has received the sheriff's deed, whether he was the original purchaser at the sale or a creditor who has redeemed from such purchaser. (Code Civ. Pro. §§ 1479, 1480; *Roome* v. *Phillips*, 24 N. Y. 463; *Chrystie* v. *Phyfe*, 19 id. 344; *Van Vechten* v. *Pearson*, 55 Paige, 512; *Holmes* v. *Carley*, 31 N. Y. 289; *Chase* v. *N. Y. C. R. R. Co.*, 26 id. 528; *People* v. *Draper*, 15 id. 532.) Section 1440 of the Code of Civil Procedure is not a violation of any constitutional provision of this state or of the United States. (*McIntyre* v. *Sanford*, 89 N. Y. 634; *Bell* v. *Vanderbilt*, 67 How. Pr. 340; *Ensign* v. *Barse*, 107 N. Y. 329; *Town of Duanesburgh* v. *Jenkins*, 57 id. 177; *Horton* v. *Town of Thompson*, 71 id. 522; *People* v. *McDonald*, 69 id. 362; 2 R. S. 375, § 69.)

Everett P. Wheeler and *Tucker, Hardy & Wainwright* for appellant. Section 1440 of the Code is constitutional. (*Bonns* v. *May*, 120 N. Y. 357; *Brevoort* v. *Brooklyn*, 89 id. 128; *Terry* v. *Wheeler*, 123 id. 76; *Clementi* v. *Jackson*, 92 id. 591; *Ensign* v. *Barse*, 107 id. 329; *Williams* v. *City of Albany*, 122 U. S. 154; *People* v. *Turner*, 117 N. Y. 227; 64 id. 268.) Previous to 1827 it was the law of this state that a mortgage or other security taken upon a loan of money at usurious rate was void. Nevertheless it was also the law that

a party seeking equitable relief in reference to such mortgage or security was obliged, as a condition of obtaining this relief, to tender the amount which he had actually received, with legal interest. This would seem to be in complete analogy to the present case. (*Livingston* v. *Harris*, 3 Paige, 527, 533; *Tupper* v. *Powell*, 1 Johns. Ch. 439; *Fanning* v. *Dunham*, 5 id. 122.) A statute may be constitutional in part, even though there are constitutional objections to another part. The point always is whether the two portions are separable. (Sedgwick on Stat. Const. 413, 414; *People* v. *Green*, 58 N. Y. 295.) In the case at bar it may be contended that the legislature has no power to require as a condition of granting the relief, the payment of the costs and expenses of the litigation. The case is much stronger in favor of the requirement that the plaintiff shall repay to the defendant the amount due at the sale, for the effect of this payment was undoubtedly to extinguish a debt due from the defendant in the first suit, the plaintiff in the second. (*McIntyre* v. *Sanford*, 89 N. Y. 634.) In considering this statute reference should be had to the legislation which it codified. It is not to be inferred from a mere change in the phraseology that it was the intention to change the law. (*Hall* v. *W. T. Co.*, 34 N. Y. 284, 287; 2 R. S. 371, 373, 380, §§ 45–49, 50, 61.) By the payment to Prentice, Preble Tucker acquired all the rights of Prentice, including the right to be reimbursed "the sum of money which was paid upon the sale." (*Booth* v. *F. Bank*, 50 N. Y. 400; *People* v. *Cromwell*, 102 id. 477; *F. & C. Bank* v. *Sherman*, 33 id. 69; *Gaffney* v. *Chapman*, 4 Robt. 275; *Eaves* v. *Henderson*, 17 Wend. 190; *Rose* v. *Rose*, 7 Barb. 174; *Witherby* v. *Man*, 11 Johns. 518; *Benton* v. *Hatch*, 43 Hun, 142.) The reversal of the judgment in favor of Mary A. P. Tucker against Mrs. Gilman does not affect the case. While that judgment was in force a purchaser of it in good faith and for value acquired Prentice's title under his judgment. (4 Kent's Comm. 436; *Wood* v. *Jackson*, 8 Wend. 9; *Davis* v. *Gaines*, 104 U. S. 386; *Gay* v. *Brignardello*, 1 Wall. 627; *Hennig* v. *Punett*, 4 Daly, 543.)

Opinion of the Court, per RUGER, Ch. J.

Charles E. Hughes and *George H. Fletcher* for respondent. The case at bar does not fall within the provisions of section 1440 of the Code of Civil Procedure. (Code Civ. Pro. §§ 1450, 1471, 1480, 1638, 1650; *Schermerhorn* v. *Merrill*, 1 Barb. 512; *Vaughn* v. *Ely*, 4 id. 159; *Smith* v. *Colwell*, 17 id. 157; *Southworth* v. *Scofield*, 51 N. Y. 513; *Ford* v. *Belmont*, 69 id. 567; *Burnham* v. *Onderdonck*, 41 id. 431; *Barnard* v. *Sims*, 42 Barb. 307.) It has not been shown that the plaintiff is in default. (Cooley on Tax. [2d ed.] 463, 464; *McIntyre* v. *Sanford*, 2 Civ. Pro. Rep. 306.) The amendment of 1881 to section 1440 of the Code of Civil Procedure authorizes an unlawful deprivation of property and is unconstitutional. (*Lawton* v. *Steele*, 119 N. Y. 226; *Wilkinson* v. *Leland*, 2 Peters, 267; *Taylor* v. *Porter*, 4 Hill, 140; Cooley on Taxn. [2d ed.] 465, 553; *Bowe* v. *U. S. R. Co.*, 36 Hun, 407; *Weston* v. *Watts*, 45 id. 219; Cooley on Const. Law, 327; *O. & M. R. Co.* v. *Lackey*, 78 Ill. 55; *Campbell* v. *Evans*, 45 N. Y. 356; *Lowry* v. *Rainwater*, 70 Mo. 152; *People* v. *Otis*, 90 N. Y. 48; *Hart* v. *Henderson*, 17 Mich. 218; *Cromwell* v. *MacLean*, 123 N. Y. 474; *Stuart* v. *Palmer*, 74 id. 183; *Marshall* v. *McDaniel*, 12 Bush. 378; *McGhee* v. *Ellis*, 4 Litt. 245; *Muir* v. *Craig*, 3 Blackf. 292; *Hawkins* v. *Miller*, 26 Ind. 173; *Price* v. *Boyd*, 1 Dana, 436; *Howard* v. *North*, 5 Texas, 290; *McLaughlin* v. *Daniel*, 8 Dana, 183; *Jones* v. *French*, 92 Ind. 138; *Short* v. *Sears*, 93 id. 505; *Bentley* v. *Long*, 1 Strob. Eq. 52; *Pope* v. *Macon*, 23 Ark. 644; *Conway* v. *Cable*, 37 Ill. 82; *Douglass* v. *Flynn*, 43 Ark. 398; *Ross* v. *Irving*, 14 Ill. 174; *Madland* v. *Benland*, 24 Minn. 372.)

RUGER, Ch. J. This appeal involves the construction and constitutionality of section 1440 of the Code of Civil Procedure, as amended by chapter 681 of the Laws of 1881, relating to the sale, redemption and conveyance of real property sold on execution.

The questions arise upon the affirmance, by the General Term, of an order of the Special Term denying the defend-

ant's motion to set aside and vacate a judgment entered herein for the plaintiff. No claim was made, but that the judgment was regular and authorized by the evidence in the case, or that it had been paid or satisfied or that there was any statute or rule of law which required the court to set aside such judgment. The purposes of the act referred to, if valid, do not require an order of the court to render them effective. The contention is, that the defendant is entitled to the relief asked for, because the plaintiff did not, within twenty days after the recovery of the judgment, make certain payments to the defendant required by the statute, in default of which the section referred to declares the judgment to be of "no force or effect."

Even if it be conceded that the provisions of the Code are valid, it does not follow that the defendant is entitled, as of course, to the relief demanded. It is not required by the language of the statute, and the court might well have said, in the exercise of its discretion, that the defendant should be left to the remedies which the statute gave him, and that it would not determine the controversy in a summary way upon motion. But we are disinclined to dispose of the appeal on this point, as important questions are raised by the case which, in the interest of justice, require an early disposition.

The evidence in the case shows that previous to the commencement of this action, the defendant had, as a subsequent judgment creditor of the plaintiff, acquired the right to a deed from the sheriff, by the redemption from the purchaser upon an execution sale, of a house and lot in New York belonging to the plaintiff; and she, believing the sale to have been unauthorized and illegal, brought this action to compel a determination of the defendant's claim under such redemption.

In answer to the action the defendant set up title in himself through the proceedings to redeem from the former judgment creditor who had bid it in on an execution sale, upon a judgment in his favor against the plaintiff. The question litigated upon the trial was as to the validity of the execution upon

which such sale was had. The trial court found that it was "a void process, and that, therefore, the sale under that void process was also void and of no effect, and, therefore, the defendant Tucker could and did take no valid title by reason of his redemption from a sale which was void." (*Place* v. *Riley*, 98 N. Y. 1.) Judgment was, therefore, rendered in favor of this plaintiff, with costs, and that judgment was affirmed, not only by the General Term, but also by this court, with costs. It is now claimed that this judgment is ineffective, because the plaintiff did not, within twenty days after its recovery, in compliance with section 1440, pay to the defendant the moneys required to be paid by that section. The section, as amended, reads as follows: "The right and title of the judgment debtor, or of a person holding under him, or deriving title through him, to real property, sold by virtue of an execution, is not divested by the sale, until the expiration of the period within which it can be redeemed, as prescribed in this article and the execution of the sheriff's deed. But, if the property is not redeemed and a deed is executed in pursuance of the sale, the grantee in the deed is deemed to have been vested with the legal estate from the time of the sale." Then follows the amendment: "And if the title of such grantee, or his assignees, is adjudged, *for any reason or cause whatsoever*, to be null and void in any action for that purpose brought by the judgment debtor, or his assignees, such judgment shall have *no force or effect*, unless within twenty days after the entry of such judgment, the plaintiff shall pay to such grantee, or his assignees, the sum of money which was paid upon the sale, with interest from the time of the sale as prescribed in this article, including the costs and expenses of defendant in defending the action in which such judgment was recovered, to be adjusted by a judge of the court in which said action was brought; and in the event of plaintiff's failure to pay such purchase-money and expenses within the time aforesaid, *said title shall be valid in said grantee.*"

It was also provided that if, in any pending action to recover such property, an appeal had been taken, the plaintiff should

have twenty days from final judgment in his favor to make the payments required.

In considering the meaning and effect of the amendatory act, it is desirable to have in mind the previous condition of the law on the subject. The Code of Civil Procedure, which was a substantial re-enactment of the provisions of the Revised Statutes, in respect to this subject, provided that, on a sale of lands on execution, the debtor's title should not be divested until fifteen months after the sale. This period was allowed him and his judgment and mortgage creditors to enable them to redeem from the sale. The first year was allowed to the debtor and the three succeeding months to the creditors entitled to the benefit of the redeeming statute. On the expiration of the fifteen months, in case there was no redemption by the owner, the sheriff was bound to execute a deed of the premises to the purchaser on the sale, or to his assignees, or to the person entitled thereto under the provisions of the statutes relating to redemption. (§ 1471.) Upon a redemption by the judgment debtor, or his heirs, executors, or assignees, the sale and certificates thereof become null and void and no conveyance, therefore, was required to be executed, as the judgment became satisfied to the extent of the sum collected and applied on the execution, and the title of the property sold remained in the judgment debtor. (§ 1448.)

In case of a redemption by a judgment or mortgage creditor he was required, not only to pay the amount specified by the statute to the person from whom he redeemed, but also to execute a satisfaction of his judgment or mortgage, stating that the redemption satisfies the judgment or mortgage in full, or to a specified amount. (§ 1463.) The purchaser of real property, sold by virtue of an execution, who has been evicted from the possession thereof, or against whom judgment is rendered in an action to recover the same, in consequence, first, of any irregularity in the proceedings concerning the sale; or, second, of the judgment upon which the execution was issued, being vacated or reversed, or set aside for irregularity, or error in fact, may recover the purchase-money

paid by him, with interest, from the person for whose benefit the property was sold. (§ 1479.)

In case of a sale vacated upon an "irregularity in the proceedings concerning the sale," the judgment under which the sale was made is revived and becomes valid to enable the judgment creditor to collect the sum paid on the sale with interest. (§ 1480.) It is also provided that a judgment creditor who completes proceedings for redemption acquires all the right, title and interest in the property which the purchaser acquired by the sale. (§ 1471.)

The protection which this scheme affords persons who have purchased land on an illegal sale, is apparently sufficient for all of the requirements of justice or equity, independent of the amended section. Thus, when such sale is declared void, the security of the judgment creditor is restored for the purpose of enabling him to reimburse himself for the moneys paid on the sale, and a purchaser on a sale whose title is defeated for any of the causes specified is authorized to recover the purchase-money paid by him from the judgment creditor, or those who represent him.

These provisions gave an adequate and sufficient remedy to all of the parties interested where there had been an illegal sale on execution. The judgment creditor lost no rights by making such sale, and the innocent purchaser and his assignees were protected as well where the judgment was founded upon irregularities in the proceedings concerning the sale, as when it had been reversed or vacated.

There could, of course, be no just foundation for a claim by the judgment creditor to be reimbursed by anyone when his judgment had for any reason been reversed or set aside, because in that event his claim would itself be extinguished and he would have suffered no loss.

A point is made by the respondent upon the language of the act, that the defendant, being a redeeming creditor, does not come within its terms. By the express language of the act, its provisions would seem to be operative only where the land had not been redeemed. There can be no

question, we think, but that, under the language of the statute, the land had, within its meaning, been redeemed, and the defendant was, therefore, precluded by its terms from availing himself of its benefits. If this should be held to be the true construction of the act, its operation would then be confined to those who purchased on the sale, and their assignees alone, and would thus exclude the defendant from the benefit of the act.

It is contended, however, by the appellant that a redeeming creditor comes within the spirit of the act, and should, therefore, be held to be within its meaning.

We should be reluctant, under any circumstances, to extend by construction the scope and application of a statute which seems to be so uncalled for and inequitable as this, and particularly so when the redeeming creditor has an adequate remedy for any loss which he may have incurred; but where a party is excluded from the benefit of an act by its express language the court is not at liberty to extend its operation by construction for the purpose of bringing him within its spirit. But, however this may be, we think that it is due to the gravity and importance of the questions raised that we should base our decision upon those more important points presented by the objections to the validity of the amendment.

It is to be observed, in the first place, that the act is predicated upon the existence of a final judgment determining not only that the property to be affected has been illegally sold, but that it still belongs to the plaintiff therein and that the defendant has no legal claim thereto, but also awarding to the plaintiff the costs of the action and impliedly holding that defendant is not entitled to such costs. The act contains, therefore, the most ample concession that the party against whose rights it is aimed is, in law, the absolute owner of the property to be affected by the amendment and is a judgment creditor of the defendant to the extent of the costs included in the judgment. It then proceeds to declare how he may be divested of this title and property and provides that, after recovering such judgment, unless he pays within a

limited time to the defendant an arbitrary sum, his property shall, by force of the act alone, be transferred to his adversary.

The sole aim of the statute thus seems to be to effect a change of title, and to wrest from one person the property which has been finally adjudged to be his, and vest it in another by mere force of the legislative will. No obligation to make the payments referred to existed at law and none was created by the act, but it simply declared that unless they are made, the defaulting party shall forfeit his property and it shall be transferred to another who has neither legal nor equitable claim to it. In effect it reverses the judgment and gives to one that which the court has deliberately adjudged to another.

The plaintiff contends that the statute is unconstitutional, because it deprives the owner of his property without due process of law, and we are of the opinion that the claim is well founded.

It cannot be the subject of doubt that an act of the legislature which provides for an involuntary transfer of property from one person to another, without due process of law, whether with or without compensation, violates the principles of the fundamental law whatever may be the pretext upon which it is founded.

It was said by Justice JEWETT in *Embury* v. *Conner* (3 N. Y. 511), after a review of the authorities, that "I think these decisions should be regarded as having settled the point that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation be made."

And it is laid down in Cooley's Constitutional Limitations (at page 444) as an elementary principle that a party cannot "by his misconduct so forfeit a right that it may be taken from him without judicial proceedings, in which a forfeiture shall be declared in due form. Forfeiture of rights and properties cannot be adjudged by legislative acts, and confiscation, without a judicial hearing after due notice, would be void as not being due process of law."

Opinion of the Court, per RUGER, Ch. J.

The act comes clearly within the spirit of our decision in *Cromwell* v. *MacLean* (123 N. Y. 474) where Judge PECKHAM, in relation to a tax sale, says: "Holding, as we must, that no title or interest in fact passed to the purchaser at these tax sales and that the original owner, therefore, still retained his title, the effect of the act in question, if valid, is by legislative fiat to transfer the title of the property of Edward C. Wilson, as trustee, to the lessees under these invalid leases. * * * Has the legislature of this state the right to take the property of A. and transfer it to B. under the guise of confirming sales made of such land *in invitum*; but by which no title, in fact or in law, passed from the owner to the purchaser? The statement of the question should be its best answer. The property thus taken is not taken by due process of law. * * * What difference does it make to say that the legislature is acting only in a way of validating proceedings to collect a tax which, in justice the owner of the land ought to pay. The answer is, that the proceedings have been so fatally defective that no title has passed and the owner has his title to his property the same as if no proceedings had been taken. Where is the authority in such case for the legislature to itself transfer the title of his property to some one else."

It is obvious that if the legislature could not directly confirm such a sale, the court ought not to strain to discover such an illegal intention in the words of an act whose motives and purposes are ambiguous and indefinite.

Tested by these rules we are unable to see how this act can be supported and at the same time effect be given to the constitutional guaranty. It was said by Judge EARL in *Stuart* v. *Palmer* (74 N. Y. 183), that "the constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done."

A consideration of the results which may be reached through the provisions of this act, when construed according to the plain meaning of its language, demonstrates the impossibility of reconciling its provisions with the requirements of the fundamental law. The obvious intention of the act is to take away

from the owner all remedy for the recovery of his property, except upon the payment by him to his adversary of a sum of money which must frequently be greater than the value of the property itself. If he remains in possession of the property, he is deprived of any remedy to protect his possession, and if his adversary has succeeded in obtaining possession, he is deprived of any remedy to recover it, except upon the condition that he pays as much, or more, than it is probably worth. An owner may, therefore, under this law, be stripped of his property under a void proceeding; be turned out of possession and denied any affirmative relief in the courts, unless upon the condition that he pays for the property its value, as determined by a judicial sale, and in addition thereto, a sum for costs and expenses, the amount of which he has no means of ascertaining, and which may also exceed the value of the property in litigation. A more effectual scheme to deprive an owner of his property could hardly be conceived. Whether he abandons it to the wrong-doer or elects to seek his remedy in the courts, the property, as a subject of value, has passed from him irrecoverably.

It is not claimed by the appellant that the change of title intended to be effected by this statute, is to be produced by any process of law, or as the result of any judicial proceeding whatever; and the statute, in plain language, declares that it shall take place as a consequence of the owner's successful attempt to establish his right through any action at law, upon a failure to make the payments required. The statute is intended to execute itself and pass the title upon the expiration of the time limited by the statute.

One of the arguments by which the statute is attempted to be sustained, is the claim that the legislature has, in effect, required the owner to repay certain sums of money which had theretofore been appropriated to her use, and, inasmuch as she has had the benefit of the amount bid on the sale, it is argued that it is in accordance with equitable rules that she should be required to repay such sums before recovering back her property.

We do not think it is competent for the legislature to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief.

If, as we have seen, he is denied all remedy for the wrong inflicted upon him, the deprivation of his property becomes just as effectual as though it had been taken from him by direct legislative enactment. But, however this may be, the act does not seem to furnish any foundation for the argument. The plaintiff has never in fact been relieved from her liability to pay the original judgment and has not derived any benefit from the attempted sale. That liability was revived against her in favor of the judgment creditor when she recovered judgment for the land, and no provision is made by the act for the satisfaction of that lien, although the payment required by the statute be actually made by her. The lien is given to one party and the payment is required to be made to another, and, in the absence of any provision in the statute making such payment a satisfaction, it is difficult to see why the lien does not remain and the judgment stand unsatisfied.

The payment required was also unnecessary for the protection of the redeeming creditor, as he had his right of action to recover back the money paid by him from the person to whom it was paid. The section, as amended, thus secures to the judgment creditor not only a lien on the land for the original debt, but leaves him in possession of an equivalent sum received from the redeeming creditor, and the redeeming creditor is entitled to receive, not only the money required to be paid under this statute by the owner, but also acquires a cause of action against the judgment creditor to recover back the money expended by him on redemption.

Both of these parties, therefore, have, by this act, double security for the same debt, and no provision is made by the statute that the payment required to be made by the owner shall satisfy any of these liabilities. It would, therefore, seem that, in fact, no benefit accrued to the plaintiff from the moneys paid on the sale, and no pretense was left for the requirement made by the statute.

But a further answer to the claim is found in the fact that the statute proceeds upon no such theory, and purports to make no such application. No reference is made in it to the liabilities of the judgment debtor, or provision made for their satisfaction, and the sum required to be paid by her has no reference to the existence of any lien or debt, or its amount. Indeed, it requires the payment as well when it has been judicially pronounced that there is no debt, as when one may, in fact, exist. The act makes no distinction between cases where the judgment itself upon which the sale was made has been reversed and set aside, and those in which the process alone has been adjudged to be void. It wholly ignores any such distinction and requires the payment to be made as well where no claim ever existed as where a legal claim has been illegally attempted to be enforced. It furnishes no argument in favor of the legality of this act, to say that some of the consequences following its enactment could, under special conditions, have been constitutionally produced, if provided for in some other way. The broad question here is, whether this enactment, construed according to its plain meaning and intent, enables one person to acquire the property of another against his will, except by due process of law. If it does, the courts must condemn it as violative of the fundamental law. The vicious purpose of the act is so thoroughly interwoven with the whole scheme of the enactment as to render it impossible to eradicate its objectionable features without reconstructing the entire section. It is not, therefore, a case where any part of the act can be supported.

We also think the act violates the constitutional guaranty, because it assumes to nullify a final and unimpeachable judgment, not only establishing the plaintiff's right to the premises in dispute, but also awarding him a sum of money as costs. After rendition this judgment became an evidence of title and could not be taken from the plaintiff without destroying one of the instrumentalities by which her title was manifested. A statute which assumes to destroy or nullify a party's muniments of title is just as effective in depriving him of his property as

one which bestows it directly upon another. (*Matter of Jacobs*, 98 N. Y. 98, and authorities there cited.) In the one case it despoils the owner directly, and in the other renders him defenseless against any assault upon his property.

Authority, which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional provision as when it attempts to do the same thing directly. Even assuming that it might be lawful for the legislature to impose a condition upon the right of a party to maintain a particular action to recover real property, no such case is here provided for. This statute makes any action at law to establish his right, subject to its provisions, and thus deprives him of all remedy for the wrong done him. It not only does this, but it attempts to reverse a judgment and give to the defeated party the fruits of a recovery awarded to another. We must bear in mind that a judgment has here been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication the fruits of the judgment become rights of property. These rights became vested by the action of the court and were thereby placed beyond the reach of legislative power to affect.

We have been referred to no authority which justifies legislation taking such rights away arbitrarily, and we know of no theory upon which it can be sustained. Instances where land, subject to a lien for taxes, has been sold therefor, and the owner has been required to pay the taxes, as a condition of maintaining an action to recover the land, or the borrower of money, at usurious rates, is required to repay the sum equitably due before maintaining a suit in equity to enforce a forfeiture of the securities held by the creditor, are obviously not analogous to the case under consideration.

We are, therefore, of the opinion that the repugnancy between the law and the constitutional rights of the citizen is so irreconcilable that the law must fail.

Another serious objection to the law seems to exist in the ambiguity of the provisions relating to the time limited for

making the payments required by it. The language of the statute requires the payment to be made within twenty days after judgment, and the subsequent portions of the section, providing that in case of pending appeals the payment might be made within twenty days after final judgment, would seem to imply that in other cases the time must be limited by the original judgment. If this be so, it might be that a defendant, by taking an appeal and staying proceedings, could defeat any effort of the owner to make the payments, and thus compel him to lose his land although he might be willing to comply with the statute. This seems to show the recklessness with which the owner's interests were regarded and the injustice which may be perpetrated under its provisions.

It is not without a feeling of satisfaction that we have found this amendatory statute unconstitutional, for in every view in which it may be considered it impresses us with the conviction that it is grossly inequitable and unjust. We can discover no reason in the situation of the purchaser at an illegal execution sale under the existing law which justifies the adoption of the careless, ill considered and inequitable provisions which distinguish this legislation.

The amended section is subject to many other criticisms which we have not felt called upon to make, as those already referred to fully justify the conclusion we have reached in the case.

The order should, therefore, be affirmed, with costs.

All concur, EARL, J., in result.

Order affirmed.

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FRANCES E. DEMAREST, by Guardian ad litem, Appellant, *v.* JAMES A. FLACK et al., Respondents.

No public policy forbids the transaction of business in this state by a corporation formed in another state by citizens of this state for the purpose of transacting business here, or requires the exclusion from recognition by the courts of this state of such a corporation.

The absence of terms imposed by the legislature as a condition of such a corporation doing business in this state, furnishes no ground for refusing to recognize it.

Statement of case.

The power rests with the legislature exclusively to say whether any, and, if so, what, terms shall be imposed upon such a corporation as a condition of its doing business here, and in the absence of any statute upon the subject and unless it appears that the corporation is formed to do acts prohibited by the laws of the state to its own citizens or corporations, if it is legally incorporated and entitled to recognition in the courts of the state where it was organized, it is entitled to recognition and protection in the tribunals of this state.

In an action to recover damages for injuries received by plaintiff while using a toboggan upon a slide on premises in the possession and management of defendants, the complaint alleged that defendants were a joint stock company doing business in New York city under a name given, and that the injuries arose from the negligence of their employes. The answer denied these allegations. Upon the trial, plaintiff gave no evidence as to defendants being a joint-stock company, but endeavored to prove a joint or partnership liability based upon allegations that the premises were leased to them for the purpose of putting up the toboggan slides. Defendants claimed that they were simply individual members of and stockholders in an incorporated company, which hired the grounds and operated the slides. They offered in evidence a certificate of incorporation of such company under the laws of West Virginia and also the Code of said state. These were objected to on the ground that the existence or incorporation of such company should have been pleaded. The objections were overruled. *Held*, no error; that the defense was not one necessary to be pleaded, but was admissible under the general denial in the answer.

By said Code it appeared that such a corporation could be formed under the general laws of that state, and the certificate, which was in proper form and properly signed and sealed, showed that all the requirements of the law had been complied with. *Held*, that the existence of an organization, so far valid as to entitle it to recognition as a corporation in the courts of this state and to transact business here, was proved.

Montgomery v. *Forbes* (148 Mass. 249); *Hill* v. *Beach* (12 N. J. Eq. 31); *Land Grant R. & T. Co.* v. *Bd. Co. Comrs.* (6 Kan. 245), distinguished.

It appeared that a resident of New York acted as president of the corporation under a so-called election, although it did not appear how or when he was elected; also that another resident of New York acted as treasurer; that the company was in possession of the grounds, admission to which was charged, and the moneys paid went through the treasurer's hands. *Held*, that there was sufficient evidence of user to show the company had accepted its charter.

Under the Code of West Virginia, the certificate is evidence of the existence of the corporation; after the issuing of the certificate, the corporators named therein are required to appoint a time and place for a meet-

ing of the stockholders to elect directors, make by-laws, etc.; directors of such a corporation are required to be residents of the state, unless by resolution passed by the corporation persons of another state are permitted to be directors. It did not appear that any such resolution was passed but it appeared that the corporators and directors were citizens of New York. *Held*, that the election of non-resident directors, without a by-law or resolution permitting it, would not *ipso facto* dissolve the corporation, or take away its corporate rights or franchises.

(Argued June 5, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made at the June term, 1890, which denied a motion for a new trial and directed a judgment in favor of defendants.

The nature of the action and the facts, so far as material, are stated in the opinion.

Seaman Miller for appellant. The alleged West Virginia corporation is fraudulent and void, and cannot be recognized by the courts of this state as a legally constituted corporation. (*Bank* v. *Earle*, 13 Peters, 558; *Wright* v. *Bundy*, 11 Ind. 398; *Merrick* v. *Van Santford*, 34 N. Y. 208; *Hill* v. *Beach*, 12 N. J. Eq. 35.) The court erred in dismissing the complaint and in not allowing the jury to pass upon the facts. (*Redenour* v. *Mayo*, 40 Ohio St. 13.)

Wales F. Severance for respondents. If the judgment appealed from was right for any reason, it will be affirmed. (*Marvin* v. *Ins. Co.*, 85 N. Y. 278–284; *Scott* v. *Morgan*, 94 id. 508–515; *Teall* v. *C. E. L. Co.*, 119 id. 654.) The plaintiff failed to establish that "the defendants" were, at the time of the accident, operating the slides. (*Southwick* v. *F. N. Bank*, 84 N. Y. 420; *Hendecker* v. *Kohlberg*, 81 id. 296; *H. Ins. Co.* v. *W. Ins. Co.*, 51 id. 93; *Stapenhorst* v. *Wolff*, 65 id. 596; *Drucken* v. *M. R. Co.*, 106 id. 157.) There are no exceptions calling for a reversal. (*Griffin* v. *L. I. R. R. Co.*, 101 N. Y. 348; *Quimby* v. *Strauss*, 90 id. 664; *Tooley* v. *Bacon*, 70 id. 34; *Wood* v. *Weimer*, 104 U. S. 786; *Ross* v.

Campbell, 19 Hun, 615–617; *Pusey* v. *N. J. R. R. Co.*, 14 Abb. Pr. [N. S.] 441; *Partridge* v. *Badger*, 25 Barb. 146, 171, 172; *Jones* v. *Dana*, 24 id. 395, 398, 399; *Eagle Works* v. *Churchill*, 2 Bosw. 166; *Buffalo & R. R. R. Co.* v. *Cary*, 26 N. Y. 75–77; *Macon County* v. *Shores*, 97 U. S. 309.)

PECKHAM, J. The plaintiff alleged in her complaint that the defendants were a joint stock company doing business in New York city under the name and style of "America's Winter Carnival Company." It was further alleged that they were the owners of the toboggan slides used at Fleetwood Park in the city of New York and that such slides were under their management and control. The plaintiff also alleged that she had, while riding on one of the toboggans upon one of the slides in the possession and management of the defendants, been accidently and seriously injured through the carelessness of defendants or their employes, and she demanded judgment for $25,000 damages.

The defendants, by answer, denied that they were a joint stock company and also denied the allegations that they were the owners of the toboggan slides mentioned or that they were under their control, and they denied all allegations of negligence either on their own part or on that of any of their employes.

Upon the trial the plaintiff gave no evidence as to the defendants being a joint stock association, but endeavored to prove a joint or partnership liability of defendants based upon the allegation that the grounds where the accident occurred were owned by the New York Driving Club, and that in the fall of 1887 the grounds were leased by it to the defendants for the purpose of putting up these toboggan slides.

The evidence tending to show even a *prima facie* liability on the part of the defendants is of the most meagre character. We will assume, however, that the plaintiff proved enough to call upon the defendants for an answer to her cause of action.

This answer was in brief that the defendants were nothing but individual members of and stockholders in an incorporated

company which had hired the grounds, owned the toboggans and operated the slides, and that whatever liability there was, if any, in favor of the plaintiff, was borne by the incorporated company, and not by the individual stockholders therein.

To prove this defense the counsel for the defendants offered in evidence a certificate of incorporation of the America's Winter Carnival Company, as organized under the laws of West Virginia, and at the same time he offered the Code of West Virginia in evidence.

The certificate and the Code were objected to by the plaintiff's counsel on the ground that there was no allegation in the answer of the existence of a corporation or the incorporation of the America's Winter Carnival Company, and that it was necessary to plead such fact before defendants could avail themselves of the defense.

The certificate was further objected to as incompetent, immaterial and illegal.

The objections were overruled and plaintiff's counsel duly excepted.

The first ground of objection as to the necessity of pleading the defense founded on the incorporation was properly overruled. It was not a defense necessary to be pleaded. It went to the root of the cause of action, and tended to show there never had been any liability on the part of defendants. It was not an affirmative defense which in substance admitted an original cause of action, but showed facts which operated as a satisfaction thereof. It was not like a defense of payment, or a release, or an accord and satisfaction. If operative, it showed there had never been any liability, and hence it was admissible under the defendants' denial of any liability as set out in the complaint. The certificate, when read in evidence, showed that it was signed by the secretary of state of West Virginia, and that it was issued under the great seal of that state, and in it the secretary declared that the corporators therein named, and their successors and assigns, were, from the 12th day of December, 1887, until the 1st day of January, 1935, a corporation by the name and for the purposes set forth in the certificate.

Opinion of the Court, per PECKHAM, J.

It was subsequently proved, under objection and exception, that this company was, at the time of the happening of the accident, in possession of the toboggan slide in question, and was the owner thereof.

As to the second ground of objection taken by plaintiff's counsel to the introduction of the certificate, that it was incompetent, immaterial and illegal, we may assume that it raises the question of the validity of the incorporation itself, and of its sufficiency as a defense. Upon this issue a few additional facts must be stated.

The Code of West Virginia which was received in evidence shows that a corporation of the kind herein spoken of could be formed under the general laws of that state by five or more persons signing an agreement to the effect stated in the statute, and by the payment by each corporator of at least ten per cent. of the par value of the stock subscribed for by him. Affidavits on the part of at least two of the corporators stating necessary facts were also required by the statute. It is further therein provided that the agreement, acknowledgment and affidavits are to be delivered to the secretary of state, and he issues to the corporators his certificate under the great seal of the state, declaring, among other things, that they and their successors and assigns are a corporation from that date until a time therein specified. The effect of the certificate is provided for by the statute, which says that the corporators and their successors and assigns shall, from the date of the certificate until the time designated therein, be a corporation, and the certificate shall be received as evidence of such incorporation. The statute provides for the holding of meetings of the corporation, including the first general meeting for purposes of organization, out of the state, and it also provides for keeping the principal office of the corporation in any state or territory of the United States, and it permits the corporation to adopt by-laws and to prescribe the qualifications of directors, and if it be not otherwise provided, every director must be a stockholder and a resident of the state of West Virginia.

The certificate in question in this case embodies an agree-

ment among five corporators, by which they agree to become a corporation by the name of America's Winter Carnival Company, for the purpose of leasing premises for amusement, among others for toboggan slides, and they agree that its principal office shall be in the city of New York, and in this agreement, they recite that they have subscribed a certain sum (named therein) to the capital of the company, and have paid ten per cent. thereof, and that the capital so subscribed was divided into shares of one hundred dollars each, which were held by them. The names of the corporators were signed to the agreement, and their residences were therein stated as being in the city of New York. The agreement, properly signed and acknowledged, was presented to the secretary of state of West Virginia, and a certificate of incorporation duly issued, as already stated.

From the evidence it is clear, upon the question of user, that there was a person who acted as president of this company under a so-called election, although it does not appear how or when he was elected. That person was a resident of New York. There was also a person who acted as treasurer of the company, and he also resided in New York. The treasurer kept a check-book and made disbursements for the company by check, and received what money came to it, and put it in the bank. There were no by-laws. The treasurer once had charge of the stock-book of the company, though at the time when he was sworn on the trial, he did not know where it was, and he supposed the company was not then in existence.

Admission to the grounds occupied and possessed by this company was charged and the money that was paid for admission to the toboggan slides went through the treasurer's hands. No one could get in without paying toll, excepting members of the driving club.

The president and vice-president were directors, as was also the treasurer and one other stockholder. This company was in possession of the toboggan slides when the accident occurred, "and no other concern, or individuals, or anybody else." The defendant Grant said he had stock in the company, which he

paid for, and that he refused to go into the business at all, unless under an incorporation. The books of the company were not produced, and it did not appear what, if any, books had been kept by it, other than the stock and check-books spoken of by the treasurer.

This is substantially all that appears in regard to user by the corporation, and the counsel for plaintiff, upon this evidence, moved to strike out the certificate of incorporation and all the testimony relating thereto, on the ground "that the directors of the concern were residents of New York, and that under the statute of West Virginia, it was necessary, in order that the corporation be duly incorporated, that the directors of the concern should be residents of West Virginia, unless a special resolution were passed by the corporation permitting persons of any other state to be such directors." The motion was denied, and thereupon, on motion of counsel for defendants, the complaint was dismissed, because no cause of action was proved against the defendants personally. There was sufficient evidence of user to make it clear that the company had accepted its charter with all its privileges and liabilities, whatever they might be. This question of user, although not specifically taken in the above objections, has been urged upon us here by the counsel for the appellant, and we think it well enough to say what we have upon the subject. As to the other points which have been actually raised by the motion to strike out the certificate, we think a proper disposition was made of them by the court below.

By the statute of West Virginia, the incorporation precedes the election of directors. After the incorporation and subsequent to the issuing of the certificate thereof by the secretary of state, the corporators named therein, or a majority of them, are directed by statute to appoint a time and place for holding a general meeting of the stockholders to elect directors, make by-laws and transact other business. A failure to adopt a by-law at the first meeting, permitting the election of non-resident directors and the election of non-resident directors at such meeting, or at a subsequent one, in the absence of a by-law

permitting it, would not *ipso facto* dissolve the corporation or take away its corporate rights or franchises. The company would still remain a legal entity, notwithstanding its failure to adopt the proper by-law, or in its absence to elect resident directors. The counsel for plaintiff was, therefore, in error in his statement as to the law of West Virginia.

We come then to the question whether upon the facts already set out this corporation was so far valid as to be entitled to recognition as such in the courts of our state.

The plaintiff says that it clearly appears that the corporators thereof were citizens of New York and the corporation was formed by them in the state of West Virginia for the sole purpose of doing business out of that state and in the state of New York, in which latter state the principal office was also to be located. These facts he says conclusively prove the invalidity of the West Virginia corporation so far at least as this state and its citizens are concerned.

If mistaken in that view he still urges that such facts render it a question for the determination of the jury whether the incorporation was attempted to be made in good faith or as a mere evasion and in fraud of the laws of West Virginia or of New York.

He claims if the jury should find the purpose was one of evasion, that in such case the incorporation would furnish no defense and the plaintiffs would be liable as individuals.

We are quite clear the case should not be submitted to a jury to pass upon the question of evasion as matter of fact. If it were, we might find different juries coming to different conclusions upon the same facts, and we should have a corporation or no corporation according to the view a jury might take of such facts. One plaintiff might prove the evasion to the satisfaction of one jury, and another plaintiff fail on precisely the same facts, and thus we should have a corporation as to A., and no corporation as to B., and the same question constantly arising as often as the corporation or its members were sued. This would be intolerable. It must be a corporation as to all persons with whom it has business dealings, or to none.

In other words it must be a question of law instead of fact. The courts of any country recognize foreign corporations through what is termed national or state comity. (*Merrick* v. *Van Santvoord*, 34 N. Y. 208; *Bank of Augusta* v. *Earle*, 13 Peters, 519; *Christian Union* v. *Yount*, 101 U. S. 352.) But whether such recognition shall be given must be decided by the courts of the country where the corporation seeks to do business. In our state, as in others, it is a question of domestic policy, and what that policy is must be determined by an examination of our own legislation. If we find any direct enactment upon the subject, it is our duty to obey it, and in its absence we must determine the question with reference to our general legislation and to the circumstances which surround us as a great and growing commercial community, having need of and employing large amounts of combined capital and for whose prosperity and growth it is of the utmost importance that such capital should have the greatest facilities extended it for useful employment, with reasonable and proper personal exemptions from liability. We can find no reason for a domestic policy that should exclude from recognition by our courts foreign corporations generally. It may be safely said there can be no such domestic policy at the present day in a civilized state. The question then arises shall we go behind the certificate of incorporation or charter of a foreign corporation for the purpose of inquiring under what circumstances and for what purpose outside the charter it was incorporated? This can only be claimed on the ground that the charter was obtained in fraud or evasion of the laws of the state which granted it, or for the purpose of evading the provisions of our own laws.

It is plain there was in regard to the procurement of this charter no fraud upon or evasion of the laws of West Virginia, even if we should admit that such fact would constitute good ground for our refusal to recognize such corporation, although no proceedings had been taken to annul its charter in the state which granted it. This point is by no means clear.

However that may be, it is impossible not to see that the

state of West Virginia has adopted a policy which favors the formation of corporations within her borders and pursuant to her laws, while the members and officers may be non-residents and where the principal business of the corporation is to be performed outside the confines of the state.

The agreement which was signed by the corporators in this case and duly acknowledged and presented to the secretary of state of West Virginia, showed that the corporators were residents of New York, and that the principal office of the corporation was to be in New York, and the inference was a fair one that the principal business of the corporation was also to be conducted in New York. The secretary of state, to whom the papers for the organization of the corporation were presented, was compelled to pass upon and decide the question whether they conformed to the laws of West Virginia before he received or filed them or gave the certificate of incorporation. He did pass upon the question and did, thereupon, issue the certificate of incorporation under the great seal of the state and attested by his official signature.

So far as the laws of West Virginia are concerned it is plain that the corporators thereupon became a corporation, and in that state the certificate was, by the laws thereof, evidence of the existence of such corporation. There was no fraud or evasion of the law of West Virginia in thus becoming incorporated. The references to her laws above made show conclusively that the formation of corporations thus composed and for the purpose of doing their principal business outside the limits of that state was contemplated in those laws. This corporation was beyond all question legally incorporated and entitled to recognition in the state of West Virginia. Unless, therefore, it can be said that the acts of our citizens in procuring an incorporation under the laws of West Virginia for the purpose of doing business here were, as matter of law, a fraud and an evasion of our own laws and hence in conflict or inconsistent with our domestic policy, such foreign corporation is entitled to recognition and protection in our own tribunals. (*Merrick* v. *Van Santvoord*, *supra.*)

It is urged that such acts are thus inconsistent and in conflict with our policy because citizens of our own state are in that way enabled to evade our own laws relative to home corporations and to avoid personal liability by incorporating under the laws of foreign states, which may be more favorable to members than are our own laws. I think when this claim is examined in the light of our own legislation it will be seen that there is no substantial basis for it to rest upon. An examination of our laws shows that it is, and for many years has been the policy of this state to enlarge the facilities for the formation of corporations. General laws are on our statute book for the formation of corporations of almost every conceivable kind, and under some one of them a corporation of the kind mentioned in this case could readily be formed. The freedom from personal liability would be as great and could be as easily attained under our own as under the laws of West Virginia. The security of the creditor would not be substantially greater in the case of the domestic than in that of the foreign corporation. In the latter the creditor has the remedy by attachment and he can obtain about as easy access to its property as if it were domestic instead of foreign.

There is really nothing to evade by incorporating under a foreign law. No harmful results flow to a creditor or to the community here by such incorporation. Where the corporation formed under another jurisdiction comes here to do business of a kind which we permit to be done by corporations and where our laws provide for incorporating individuals for the purpose of doing that business, it is difficult to see how the terms "evasion" and "fraud" can be properly applied to acts of our citizens whereby they obtain incorporation in another state. When they come in our state to do business they must conform to our laws relating to foreign corporations and comply with the terms laid down by us as conditions of allowing them to transact business here. In the case of many kinds of corporations such conditions have already been imposed by our laws, and if there be any kind where none is imposed, it is conclusive evidence that up to this time the legislature has not

thought it conducive to the true interests of the state and its citizens to impose them. I do not intimate that it is necessary for a state to expressly by statute exclude foreign corporations from acting within its jurisdiction. The policy of the state may exclude them and that policy may be clearly established by a reference to the general legislation of a state. I find none such in the laws of this state.

It has been urged that the easy way which our laws provide for forming corporations is itself a reason why we should not recognize as a corporation those of our own citizens who have gone to another state for the purpose of incorporating themselves under the laws thereof, to do business in our own state as such corporation.

We think there is very little force in the argument. The public policy which we see in our own state, as evidenced by her laws upon the subject of the formation of corporations, is one which looks to their ready and easy formation as a means of transacting business with an accumulation of capital and an exemption from personal liability to the largest extent consistent with reasonable supervision by the state. The facilities for incorporation offered by this state are not the result of any desire to promote the formation of corporations here as against their formation in other states. They are offered because of a policy on our part which urges upon the state the propriety of furnishing them as one means of controlling the business done by them and keeping it within our borders. If in any particular case it is thought by those interested in the matter that the business can be done in our own state and by our own citizens with greater facility under the form of a foreign corporation than under that of a domestic one, there is no public policy which forbids its transaction under such form. The supervision of a foreign corporation by this state may easily be exercised by imposing terms as a condition of permitting it to do business here. The absence of any such terms in our legislation forms no reason for refusing to recognize the corporation. The power rests with the legislature to say whether any, and if so what, terms shall be imposed upon such corpo-

rations as a condition of granting them permission to do business here. Those terms can only be imposed by the legislature, and in their absence our courts ought not, merely on that account, to refuse to recognize a foreign corporation. In the absence of legislation, our courts must either refuse absolutely, or else they must recognize the right of such corporations to come to this state and do business here. The courts cannot themselves impose terms or conditions.

The case of *Montgomery* v. *Forbes* (148 Mass. 249) is not necessarily in conflict with these views. In that case the defendant, a resident of Massachusetts, went to New Hampshire and there executed and filed certain papers for the purpose of forming a corporation in that state, for the reason that its tax laws were more favorable than those of Massachusetts, and because he desired to avoid personal responsibility. The whole business was to continue to be done in Massachusetts, and these steps were taken in order to avoid the laws of that state.

The court held that the defendant had not complied with the terms of the New Hampshire act, and hence had never become incorporated. There was no tribunal in New Hampshire to which the papers in regard to a proposed corporation could be submitted and which had power to decide whether the law had been complied with, and upon compliance to issue a certificate of incorporation. But all persons filed their papers at their peril. If the question ever arose as to a compliance with the law, it had to be decided by comparing the papers with the statute. The Massachusetts court did that, and decided that the defendant did not comply with the New Hampshire statute, and that no corporation had ever been formed.

In *Hill* v. *Beach* (12 N. J. Eq. 31), the Court of Chancery of New Jersey in a proceeding for an accounting said that certain persons who had entered into an agreement with a view to form a company to do business in New Jersey, and who thereupon undertook to form themselves into a corporation under the general act of this state relative to the formation of manu-

facturing corporations, passed in 1848, and who complied with the forms of such act, would nevertheless not be recognized by the courts of New Jersey as a legally constituted corporation. The chancellor said they were not a foreign corporation, "for it is perfectly manifest upon the face of their proceedings that their attempted organization under the general law of New York respecting corporations was a fraud upon the laws of that state."

In what respect it was a fraud does not appear unless it were one because the corporators were residents of New Jersey and intended to do business in that state under the New York incorporation. From what has already been said we do not think those facts make out a case for a refusal to recognize a corporation legally constituted and existing in the foreign state.

We recognize corporations formed by the citizens of a foreign state under its laws for the purpose of doing business, among other places, in our own state. Where is the essential difference between such a corporation and one legally incorporated under such foreign state for the same purpose, but the members of which are citizens of our own state? Whose rights are jeopardized more in the case where the members of the corporation are our own citizens than where they are citizens of the foreign state? What enlightened policy is violated by the recognition of the foreign corporation composed of residents of this state, which would not also and equally suffer by the recognition thereof when composed of non-residents? And yet, beyond all cavil, our policy is to recognize the latter.

The truth is, foreign corporations are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst. They carry no black flag, and the policy of all civilized nations is to grant them recognition in their courts. It seems to me that every reason which urges upon us the recognition of foreign corporations organized with power to do business in our state and composed of citizens of the foreign state, is equally potent

when the foreign corporation is composed of our own citizens. It has always been supposed that a state should at least deal as liberally with its own citizens as with those of foreign states. If, therefore, we permit foreign citizens to come within our limits in the form of a foreign corporation organized with power to do business here and recognized by us, why should we not permit our own citizens to avail themselves of the like privilege? If we impose terms and conditions upon foreign corporations, as such, doing business here, those same terms and conditions still and equally apply to a foreign corporation when composed of our own citizens. Why should they not be placed at least upon an equality with the foreign citizen?

The case of *Land Grant Railway, etc., Co.* v. *Board County Comrs., etc.* (6 Kan. 245), simply holds that the courts of that state will not recognize a corporation formed under the laws of Pennsylvania, where the corporation is not itself permitted to do business in the state which grants its charter. It was also stated in the above case that the charter, if enacted by the Kansas legislature, would have been void as contravening two constitutional provisions. In such a case it would scarcely be expected that a foreign state would grant greater recognition and privileges than were accorded by the state under which the corporation was formed. It might readily be supposed that no rule of comity compelled the recognition of a foreign corporation formed to do acts which are prohibited by the laws of the state to its own citizens or corporations.

It is upon this principle that *Empire Mills* v. *Alston Grocery Co.* was decided by the Court of Appeals of Texas, and reported in the Railway and Corporation Law Journal of April 11, 1891 (Vol. 9, No. 15), and to which our attention has been called. The legislature of Texas prohibited the incorporation of corporations in that state of the character of the Iowa corporation, and the court held that comity did not extend to the recognition of such a corporation by the courts of Texas.

After a careful examination of the case we have come to the conclusion that the defendants sufficiently proved the existence

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of a valid corporation under the laws of West Virginia, and that there was nothing in the other facts proved which should cause us to refuse recognition of that corporation.

The result is that the complaint was properly dismissed, and the judgment to that effect should be affirmed, with costs.

All concur.

Judgment affirmed.

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WILLIAM GATES, Appellant, *v.* THE STATE OF NEW YORK, Respondent.

It seems, that the state in submitting itself to the jurisdiction of a tribunal, with respect to claims against it for damages sustained by reason of any accident occurring on its canals, or connected with their care and management, subjected the determination of its liability to the government of those rules which usually obtain in similar cases.

It seems, that an employe, without experience in a particular work required of him, in which danger to him exists, from causes not apparent, but known to his employer, is entitled to have such information communicated to him as will apprize him of the nature of the work and of the possible risks in its execution.

Under the provision of the act of 1870 (Chap. 321, Laws of 1870), conferring upon the board of canal appraisers jurisdiction to hear and determine claims against the state for injuries alleged to have been sustained by reason of the canal, which requires the proceeding to be initiated by the filing of the claim in the office of the appraisers, there must have been a delivery by or on behalf of the party of his claim at the office itself to constitute and enable him to allege and establish the jurisdictional fact of a filing; proof of the directing and mailing of a statement of the claim to the canal appraisers is not sufficient.

The jurisdiction of said board being limited and special, no presumption will be entertained in support of it, but the fact conferring it must affirmatively and conclusively appear.

A citizen who seeks to avail himself of the privilege to sue the state must be held to strictness in procedure; this right being dependent upon compliance with the terms of the statute granting it jurisdiction of his claim, can be acquired only in the way prescribed.

The legislature has no authority to confer jurisdiction upon the Board of Claims to pass upon a claim of an individual against the state for injuries arising from the canals, which claim, had it arisen between citizens, would be barred by the Statute of Limitations. (State Const. § 14, art. 7.)

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Accordingly *held*, that the act of 1886 (Chap. 244, Laws of 1886), authorizing and directing the Board of Claims to hear a certain claim against the state for injuries received by the falling of a canal bridge, was invalid, in so far as it authorized the board to make an award; it appearing that the accident happened in 1877.

(Argued June 5, 1891; decided October 6, 1891.)

APPEAL from an award of the Board of Claims, made December 19, 1888.

The appellant claimed to recover against the state for personal injuries received from the falling of a bridge over the Oswego canal, in the work of repairing which, at the time, he was engaged. His regular employment had been that of an ordinary laborer upon one of the state scows on the canal. The bridge had been reported to the canal commissioners, in the year previous to the accident, to be structurally unsound and in a very dangerous condition. The foreman of the state scow, upon which the claimant was working when he received his directions, proceeded to the bridge in question to make certain repairs upon it. When this work was almost completed the structure gave way, from its general unsoundness, and the claimant being precipitated into the canal received his injuries. In 1879 and within two years of the occurrence a statement of claim for damages was made out for him, which was directed and mailed to the canal appraisers. It was conceded that no other steps were taken and that this paper could never be found and that there was no record of its receipt or filing in the office of the canal commissioners or of the Board of Claims. In 1886 the legislature passed an act authorizing and directing the Board of Claims to hear this claim and to award "in like manner as though such claim had been filed within the time now provided by law." That tribunal awarded nothing, upon the grounds that no liability had been established against the state and that the claim was barred by lapse of time. From that decision the claimant appeals to this court.

Louis Marshall for appellant. The Board of Claims had jurisdiction to consider the appellant's claim. (Laws of 1870,

chap. 321, § 1; *Sipple* v. *State*, 99 N. Y. 284; *Bowen* v. *State*, 108 id. 106; *Rexford* v. *State*, 105 id. 229.) The state assumes towards its employes the same duties and incurs the same obligations which any employer would towards his employe. (*Loughlin* v. *State*, 105 id. 159.) The state owed to the claimant, as its servant, the duty of furnishing him with a safe and proper place in which to prosecute his work, and this duty was one which could not be delegated by it to a servant of any grade so as to exonerate it from its responsibility to a servant injured by its non-performance. (*Pantzar* v. *T. F. I. M. Co.*, 99 N. Y. 368; *Ryan* v. *Fowler*, 24 id. 410; *Coughtry* v. *G. W. Co.*, 56 id. 124; *Devlin* v. *Smith*, 89 id. 470; *T. R. R. Co.* v. *Conway*, 68 Ill. 560; *Potts* v. *Plunkitt*, 9 Ir. [C. L.] 290.) The state had knowledge of the rotten and dangerous condition of the bridge upon which it put the claimant to work. (*Rexford* v. *State*, 105 N. Y. 232; *Bowen* v. *State*, 108 id. 168.) The claimant being ignorant of the plan of the structure and the character or existence of any defects in the bridge, did not assume any of the risks incident to their existence, since an employe assumes only such risks as he has knowledge of or which are obvious and necessarily incident to the business in which he is employed. (*Clark* v. *Holmes*, 7 H. & N. 397; *Laning* v. *N. Y. C. & H. R. R. R. Co.*, 49 N. Y. 521; *Snow* v. *H. R. R. Co.*, 8 Allen, 441; *Plank* v. *N. Y. C. & H. R. R. R. Co.*, 60 N. Y. 607; *Mehan* v. *S., B. & N. Y. R. R. Co.*, 73 id. 585; *Booth* v. *B. & A. R. R. Co.*, Id. 40; *Hawley* v. *N. C. R. R. Co.*, 82 id. 370; *Kain* v. *Smith*, 89 id. 375; *Pantzar* v. *T. F. I. M. Co.*, 99 id. 368.) The state, through its officers and agents being cognizant of all the dangers incident to the bridge, was bound to warn the claimant of all the latent and extraneous dangers of which it knew or of which in the exercise of ordinary care it would have known, and failing in this respect, it became liable to the claimant for all the consequences resulting from the lack of such warning. (Wood on Master and Servant [2d ed.] §§ 254, 256; *Baxter* v. *Roberts*, 44 Cal. 187; *McGowan* v. *L. P. M. Co.*, 3 McC. 309; *Kain* v. *Smith*, 89 N. Y. 375; *Spellman* v. *Fisher*, 56 Barb.

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151; *Connolly* v. *Poillon*, 41 id. 368; *Homer* v. *Nicholson*, 56 Mo. 220; *Harrison* v. *C. R. R. Co.*, 31 N. J. L. 47; *Paulmier* v. *E. R. R. Co.*, 34 id. 151; *Nichols* v. *B. & D. M. Co.*, 53 Hun, 237; *Walsh* v. *P. V. Co.*, 110 Mass. 23; *Weems* v. *Mathieson*, 2 McQ. 25; *Cooper* v. *H. M. Co.*, 14 Allen, 193; *Bickford* v. *Heckmann*, 27 N. Y. S. R. 80; *Lafrans* v. *N. Y. & M. V. W. Co.*, 55 Hun, 452.) There is no evidence in the case indicating that the claimant's injuries were due in any way to the negligence of a fellow servant, but if there was such negligence it was coupled with negligence on the part of the state or its duly authorized officers, and would not exempt it from liability. (*Ellis* v. *N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 546; *Cone* v. *D., L. & W. R. R. Co.*, 81 id. 206.) The claimant's cause of action never became barred by any Statute of Limitations, and this case does not come within any of the prohibitions of the Constitution. (*O. S. Co.* v. *Otis*, 100 N. Y. 446; *Olney* v. *Blasier*, 12 N. Y. S. R. 211; *Hastings* v. *B. L. Ins. Co.*, 6 N. Y. Supp. 374; *Veeder* v. *Mudgett*, 95 N. Y. 295; *M. Co.* v. *Laimbeer*, 108 id. 578; *Bishop* v. *Cook*, 13 Barb. 326; *Dodge* v. *Potter*, 18 id. 193; *R. S. Bank* v. *Averill*, 96 N. Y. 467; Laws of 1883, chap. 205, § 12; *Cole* v. *State*, 102 N. Y. 48; *Evans* v. *Cleveland*, 72 id. 486; *Corkings* v. *State*, 99 id. 491; *McMaster* v. *State*, 103 id. 555; *McDougall* v. *State*, 109 id. 73.)

Charles F. Tabor, *Attorney-General*, for respondent. No appeal from the award herein was authorized by law. (*People* v. *Dennison*, 84 N. Y. 281.) The claim of the appellant herein, William Gates, was filed with the Board of Claims on July 23, 1886, under and in pursuance of chapter 244 of the Laws of 1886. It was never properly filed with the canal appraisers. (Laws of 1870, chap. 321, § 2; *M. Co.* v. *Laimbeer*, 108 N. Y. 578; *Lewis* v. *State*, 96 id. 71; *Bloom* v. *Burdick*, 1 Hill, 130; *McElrath* v. *U. S.*, 102 U. S. 440; *Williams* v. *Van Valkenburg*, 16 How. Pr. 146; *Rathbone* v. *Acker*, 18 Barb. 393; *People* v. *L. & B. R. R. Co.*, 13 Hun, 212.) If there was no proper filing of this claim, or if, in

fact, the canal appraisers never received this claim, the Statute of Limitations began to run against it on the 23d of May, 1877, and as between citizens would have been a bar on May 23, 1880, and the subsequent ineffectual proceedings upon the part of the claimant did not suspend the running of the statute. And, therefore, chapter 244 of the Laws of 1886, so far as it authorized and directed the Board of Claims to make an award herein, was in direct violation of section 14 of article 7 of the Constitution. (*McDougal* v. *State*, 109 N. Y. 73; Code Civ. Pro. § 383; *O'Hara* v. *State*, 112 N. Y. 153.) The claimant herein is estopped from now taking the position that this claim was ever properly filed with the canal appraisers in 1879. (*Corkings* v. *State*, 99 N. Y. 497.) The evidence and the findings fully justified the Board of Claims in making the award. (*Loughlin* v. *State*, 105 N. Y. 159.) But if the board in this case had found that Wilson was negligent, the award must have been the same. (*Stringham* v. *Hilton*, 111 N. Y. 198.) The claim made that the bridge being out of repair, it was consequently an unsafe place furnished by the state for the work of the employes is untenable. (*Butler* v. *Townsend*, 26 N. E. Rep. 1019; *Brick* v. *R., N. Y. & P. R. R. Co.*, 98 N. Y. 215; *Hussey* v. *Coger*, 112 id. 614.) There was no need of actual notice of the defects. It must be assumed that plaintiff was possessed of the ordinary judgment and sense of those who occupied a similar position. (*Powers* v. *N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 278; *Hickey* v. *Taaffe*, 105 id. 37.) This was an accident which the state could no more have anticipated than the claimant, and, therefore, the principle of *damnum absque injuria* applies. (*Loftus* v. *U. F. Co.*, 84 N. Y. 461; *Burke* v. *Witherbee*, 98 id. 567; *Hickey* v. *Taaffe*, 105 id. 37.)

GRAY, J. If this claim might be disposed of upon its merits, there would be no difficulty in establishing the liability of the state in damages. The claimant was a mere laborer, in the employ of the state upon ordinary canal work, and when, in obedience to orders, he proceeded to labor upon the bridge,

he was not only inexperienced, but he was ignorant of its actual condition. He cannot be said to have assumed any of those risks which were incidental to such work from the existence of the serious defects in the bridge structure. He was entitled to believe that the place assigned to him for the performance of his work was an ordinarily safe one, and that his employers had no information concerning the risks attendant upon laboring there, which he did not possess himself, or which ordinary observation and prudence would not have revealed. The state, in submitting itself to the jurisdiction of a tribunal with respect to claims against it for damages sustained by reason of any accident occurring upon its canals, or connected with their care and management, subjected the determination of its liability to the government of those rules, which usually obtain in cases between the employer and the employed.

It is a cardinal rule of conduct in that relation that the former shall not expose the persons who are engaged in performing his work to unreasonable risks. They have the right to assume that where they are directed to work is as safe a place, as is compatible with the nature of the undertaking, and that their employer has not neglected any means in his power, or at his disposal, to render its performance reasonably free from danger to life and limb. While in work of an inherently dangerous nature the workman is ordinarily held to assume that certain risk which must attend upon its execution, that rule involves, and depends for its application upon the knowledge, or means of knowledge, upon the workman's part of the attendant peril to him. Such knowledge may be presumed to be possessed, by reason of previous employment and experience, or to be suggested by ordinary observation and appearances. If the workman is without experience in the particular work required of him, and if, as here, danger for him exists from causes not apparent, but which are known to his employers, I think it unquestionable in principle that an obligation should be deemed to rest upon them to communicate such information as would apprize the workman of the nature of the work, and of the possible risks in its execution. He

should be placed on a par, as nearly as possible, in such respects, with his employer. This duty is not only within the letter and spirit of the rules established by many decisions, but it is one which should be dictated by every consideration of prudence and of responsibility towards others.

But, however meritorious the claim here, the claimant's remedy against the state had ceased to exist, at the time of its submission to the Board of Claims, from the intervention of the general Statute of Limitations. Section 14 of article 7 of the Constitution prohibited the allowance of any claim which, as between citizens of the state, would be barred by lapse of time. It was, therefore, not within the powers of the legislature, by the passage of chapter 244 of the Laws of 1886, to confer jurisdiction upon the Board of Claims to allow, or to award upon, this claim, if it was already barred by the expiration of the time limited by the general statute for the commencement of actions for damages for personal injuries resulting from negligence. (Code of Civil Pro. § 383.)

As the accident occurred in 1877, the bar of that statute would fall upon the lapse of three years.

The origin of the difficulty in the way of claimant's recovery was in his failure to comply with the requirements of the law in respect to filing his claim. Chapter 321 of the Laws of 1870 conferred jurisdiction upon the board of canal appraisers to hear and determine such claims against the state, and the proceeding thereby authorized was required to be initiated by the filing of the claim in their office. What was done in this case was to mail the statement to the canal appraisers, and the appellant's counsel has ingeniously argued that that was a sufficient compliance with the law and constituted a filing. The presumption as to the receipt of letters, properly directed and sent through the mails to a person, is one of fact and is based upon the circumstances of the particular case. Here, however, the question of the receipt and filing of the claim goes to the very foundation of the jurisdiction and right of the tribunal to act upon it. Its powers are exclusively derived from the consent of the state, as expressed in the act of the legislature,

and none may be implied, except such as may fairly be deemed incidental and necessary to the jurisdiction when once acquired. The citizen, who seeks to avail himself of the privilege to sue the state, must be held to strictness in procedure; just as it must be held in all cases, where the remedy is one which exists and is enforceable solely through the provisions of some statute. His right being dependent upon compliance with the terms of the statute, jurisdiction of his claim can be acquired by the tribunal only in the way prescribed. To require that "claimants shall file their claims in the office of the canal appraisers," has but one meaning and effect. There must have been a delivery by, or on behalf of, the party of his claim at the office itself to constitute, and to enable him to allege and to establish, the jurisdictional fact of a filing. Anything short of a delivery leaves the fact of the filing disputable, and that, I think, would be quite inconsistent with the principle which underlies the jurisdiction of the inferior tribunal. Its jurisdiction being limited and special, no presumption will be entertained in support of it; but the fact conferring it must affirmatively and conclusively appear. (See *Foot* v. *Stevens*, 17 Wend. 483.)

The state cannot be sued without its consent and it has the right, in authorizing the maintenance of proceedings for the recovery of claims against it, to impose such terms and conditions and to prescribe such procedure as its legislative body shall deem proper. The conditions imposed become jurisdictional facts and determine the status and right of the litigant. If we should hold that the mailing by a claimant of his claim, directed to the canal appraisers, was equivalent to a filing in the office, I think we should be disregarding the plain reading of the law and denying to the words of the statute their plain and usual force and significance.

When, under section 12 of chapter 205 of the Laws of 1883, the Board of Claims was created and claims pending before the board of canal appraisers were transferred to the new tribunal, the present claim, for lack of the filing required by the statute, was not one of those included in the transfer. The failure to file had resulted in the loss to the claimant of

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his remedy against the state. The act of 1886 was of no avail to him, for it was in violation of the constitutional amendment of 1874, in so far as it authorized the Board of Claims to make an award upon an unenforceable claim. Its only effect was to authorize the board to hear the claim, notwithstanding the limitation in the act creating that tribunal, as to the time of filing. The claim came before the board subject to all constitutional limitations and, therefore, to any statutory provisions which, as between citizens of the state, would have barred an action. (*McDougall* v. *The State*, 109 N. Y. 73.)

The result reached is not, on general grounds, unjust. The claimant's remedy was lost by the failure to make use of means, from the very first moment available to him. There was in existence a tribunal, before which his claim could at all times have been prosecuted against the state. The omission to commence the proceeding in the mode and within the time pointed out by the act of 1870, which authorized such claims to be heard and determined, and the eventual lapse of the period of time limited by the general statute for the commencement of actions of that nature, operated to bar any recovery, when, by virtue of the act passed in 1886 for his relief, the Board of Claims was directed to hear the claim. Upon these facts appearing that court could not make any award, because of the constitutional prohibition as to such a claim.

For the reasons I have stated, the decision and award of the Board of Claims should be affirmed, with costs.

All concur.

Award affirmed.

DEMPSTER C. AUSTIN, Respondent, *v.* CHARLES C. VROOMAN et al., Appellants.

Where, in the course of proceedings before a justice of the peace, which he was forced to entertain and in which he had jurisdiction of the subject-matter and acquired jurisdiction of the person of one charged with an offense, a question is presented as to whether, on account of certain steps taken, the justice has authority to proceed further, which question is dependent upon the construction of a statute, and he, in

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good faith, erroneously decides that he has authority to and does proceed, the error is simply one of judgment upon a question of law, and the justice is not responsible therefor in a civil action.

In an action for false imprisonment it appeared that the defendant V. appeared before the defendant C., a justice of the peace, and made a sworn complaint against the plaintiff, charging him with supplying diluted milk to a butter factory in violation of the act of 1885 (Chap. 183, Laws of 1885), which makes such an act a misdemeanor. C. issued a warrant. Plaintiff was arrested, and on being arraigned pleaded not guilty; he waived a preliminary examination and offered bail for his appearance before the next grand jury. The district attorney, who appeared for the people, claimed that the justice had exclusive jurisdiction. The offer was overruled, and plaintiff thereupon demanded a jury, which was summoned; he was tried, found guilty on the trial, sentenced to pay a fine, and to be imprisoned until it was paid, not to exceed ninety days; and thereupon he was taken to and confined in the county jail until his discharge was procured. The conviction was affirmed by the Court of Sessions of the county, but was reversed by the General Term. *Held*, that while C. erred in trying plaintiff after his offer of bail, he did not render himself liable in damages, and that the complaint was properly dismissed.

The distinction between such a case and one where the justice proceeds without jurisdiction of the subject-matter and the person, pointed out.

Woodward v. *Paine* (15 Johns. 492); *Lange* v. *Benedict* (73 N. Y. 12), distinguished.

(Submitted June 8, 1891; decided October 6, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made April 28, 1890, which reversed a judgment, entered upon a decision of the court on trial at Circuit, in favor of defendants and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. A. McConnell for appellant Vrooman. It was no error on the part of the justice to require the defendant to submit to trial in the Court of Special Sessions. (Laws of 1885, chap. 183, § 3; *People* v. *Kennedy*, 2 Park. 316; *Hill* v. *People*, 20 N. Y. 369; *People* v. *Dutcher*, 83 id. 243; Laws of 1886, chap. 593; Code Crim. Pro. §§ 39, 56, 57; *Aldrich*

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v. *Hawkins*, 6 Blackf. 125; *Schueler* v. *Reimar*, 118 N. Y. 61; *Johnston* v. *N. Y. C. & H. R. R. Co.*, 49 id. 445.) The justice acted judicially in deciding the question presented upon the plaintiff's application. (*Waldheim* v. *Sichel*, 1 Hilt. 45; *Cambell* v. *Ewalt*, 7 How. Pr. 399; *Adams* v. *Freeman*, 9 Johns. 117; *Taylor* v. *Trask*, 7 Cow. 249; *Beaty* v. *Perkins*, 6 Wend. 382; *Barker* v. *Stetson*, 7 Gray, 53; *Nowak* v. *Woller*, 31 N. Y. S. R. 458; *Landt* v. *Helts*, 19 Barb. 283; *Marks* v. *Townsend*, 97 N. Y. 590; *Fischer* v. *Langbein*, 103 id. 85; *Hallock* v. *Dominy*, 69 id. 238; *Lewis* v. *Rose*, 6 Lans. 206; *Kenner* v. *Morrison*, 12 Hun, 204; *Lange* v. *Benedict*, 8 id. 362; 73 N. Y. 12; *Ayers* v. *Russel*, 50 Hun, 282; *Scott* v. *Ely*, 4 Wend. 555.) Plaintiff's exceptions are untenable. (*Ketchem* v. *Fox*, 52 Hun, 284; *Markson* v. *Townsend*, 97 N. Y. 590; *Stewart* v. *Hawley*, 21 Wend. 552; *Cuyler* v. *McCartney*, 40 N. Y. 221; *Wilson* v. *O'Day*, 5 Daly, 354.) The plaintiff at the trial not only entirely failed to make out a cause of action for malicious prosecution, but he voluntarily abandoned such a cause of action. (*Marks* v. *Townsend*, 97 N. Y. 590; *Farnam* v. *Feeley*, 56 id. 451; *Thaule* v. *Kreckeler*, 81 id. 428; *Miller* v. *Deere*, 2 Abb. Pr. 1; *Burt* v. *Place*, 4 Wend. 591; *Haupt* v. *Pohlman*, 16 Abb. Pr. 301; *Palmer* v. *Avery*, 41 Barb. 290.)

Watson M. Rogers for appellant Chase. The justice had jurisdiction to entertain the information and issue the warrant for plaintiff's arrest. (Laws of 1885, chap. 183, § 14; *People* v. *Austin*, 49 Hun, 396.) A justice of the peace has general original jurisdiction to apprehend and examine all persons charged with crime against the state. (2 R. S. 706, §§ 56, 147; *Hunt* v. *Hunt*, 72 N. Y. 230; 74 id. 406; *King* v. *Pool*, 36 Barb. 242; *Miller* v. *Adams*, 7 Lans. 131; 52 N. Y. 409; *Nowak* v. *Waller*, 10 N. Y. Supp. 199; *Stewart* v. *Hawley*, 21 Wend. 552; *Bocock* v. *Cochran*, 32 Hun, 521; *Hallock* v. *Dominy*, 69 N. Y. 238.) A judge is exempt from a civil suit or indictment for any act done or omitted to be done by him sitting as a judge. (*Yates* v. *Lansing*, 5 Johns.

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282; *Lange* v. *Benedict*, 73 N. Y. 432; *Harmon* v. *Brotherson*, 1 Den. 537; *Landt* v. *Helts*, 19 Barb. 283; *Clark* v. *Holbridge*, 58 id. 61; *Minnehan* v. *Thomas*, 9 Wkly. Dig. 32; *Kennar* v. *Morrison*, 12 Hun, 204; *Ayers* v. *Russell*, 50 id. 283; *Day* v. *Bach*, 87 N. Y. 56; *Marks* v. *Townsend*, 97 id. 590; *Evarts* v. *Shead*, 102 id. 297; *Fischer* v. *Langbein*, 103 id. 84; *Mostyn* v. *Fabrigas*, Cowp. 172; 1 Smith's L. C. 765; *Calder* v. *Halket*, 3 Moore, 28.) There was no such demand by the plaintiff for a trial after indictment and offer of bail as to put the justice in the wrong and oust him of jurisdiction. (Code Crim. Pro. § 211.) No error was committed in requiring the plaintiff to elect which cause of action he would claim under. (*Nebenzall* v. *Townsend*, 10 Daly, 232.)

Wm. H. Gilman for respondent. The defendant Chase had no jurisdiction to try plaintiff. (*Hill* v. *People*, 20 N. Y. 363–369; Code Crim. Pro. § 56; *People* v. *Austin*, 49 Hun, 396; *People* v. *Harris*, 123 N. Y. 70; 49 Hun, 396.) A Court of Special Sessions is a court of special and limited jurisdiction. (*Lange* v. *Benedict*, 73 N. Y. 34; *Yates* v. *Lansing*, 5 Johns. 289; *Randall* v. *Brigham*, 7 Wall. 523; *Wadsworth* v. *McCullough*, 10 Johns. 93; *Bigelow* v. *Stearns*, 19 id. 39; *Case* v. *Shepard*, 2 Johns. Cas. 27; *Warner* v. *Perry*, 14 Hun, 337; *Mygalt* v. *Washburn*, 15 N. Y. 316–321; *Doyle* v. *Russell*, 30 Barb. 300.) The refusal of defendant Chase to permit plaintiff to have a trial after the intervention of a grand jury, was not a judicial error. It was a jurisdictional defect that rendered the subsequent proceedings entirely void. (*People* v. *Austin*, 49 Hun, 396; Code Crim. Pro. §§ 56, 211; *Tracy* v. *Seamans*, 7 N. Y. S. R. 144; *Fischer* v. *Langbein*, 103 N. Y. 84; *Gordon* v. *Longest*, 16 Pet. 104; *Striker* v. *Mott*, 6 Wend. 467; *Case* v. *Shepard*, 2 Johns. Cas. 27.) It was not necessary for plaintiff to make out and actually tender a bond for his appearance before the grand jury. (*Blewett* v. *Baker*, 58 N. Y. 611; *Haynor* v. *A. P. L. Ins. Co.*, 69 id. 435; *Lawrence* v. *Miller*, 86 id. 131; *Cornwell* v. *Haight*, 21

id. 462; Code Crim. Pro. § 211.) The defendant Vrooman is equally responsible with the defendant Chase. (*Day* v. *Bach*, 87 N. Y. 56; *Fischer* v. *Langbein*, 108 id. 84; *Miller* v. *Adams*, 52 id. 409.) It was not incumbent upon plaintiff to show a lack of jurisdiction. The jurisdiction of a court of limited jurisdiction must be established by the one seeking justification under its act. Its jurisdiction is never presumed. (*People ex rel.* v. *Warden*, 100 N. Y. 26; *Adams* v. *S. & W. R. R. Co.*, 10 id. 328; Const. N. Y. art. 1, § 6.)

PECKHAM, J. The defendant Chase was a justice of the peace in Jefferson county, and the defendant Vrooman, in August, 1887, appeared before him and made a sworn complaint against the above plaintiff, charging that he supplied to a certain butter manufactory diluted milk, etc. The justice issued a warrant for the arrest of the plaintiff upon such complaint, and he was thereupon arrested and brought before the justice. The offense charged against the plaintiff was a violation of chapter 183 of the Laws of 1885, which was a misdemeanor. The plaintiff, when arraigned before the justice, pleaded not guilty. The district attorney appeared for the People. The record shows that the plaintiff waived a preliminary examination and offered to give bail for his appearance at the next grand jury of Jefferson county. The justice overruled the offer. The plaintiff then demanded a jury, which was summoned, the case was tried and the plaintiff found guilty and sentenced to pay a fine of $100 and to be imprisoned until it was paid, not to exceed ninety days. He was thereupon taken by a constable to the county jail and was there in confinement from early in the morning until some time in the afternoon, when his counsel procured his discharge. The case was taken to the Court of Sessions of Jefferson county, where the conviction was affirmed, but upon appeal to the General Term of the Supreme Court, it was reversed and the plaintiff discharged, upon the ground that after the plaintiff had offered to give bail to the grand jury, the justice should have accepted it, and that he erred in then deciding to

try the plaintiff. The plaintiff commenced this action for false imprisonment and malicious prosecution, and upon the trial he abandoned the latter ground and sought to recover for the false imprisonment.

Upon these facts the trial court nonsuited the plaintiff and upon appeal the judgment of nonsuit was set aside and a new trial granted by the General Term, and from the order granting the new trial the defendants appeal here, giving the usual stipulation for judgment absolute in case the order be affirmed. The plaintiff contends that upon his arraignment he had the option to submit to a trial before the justice, or to demand a trial by jury after indictment, and if he chose the latter it was the duty of the justice to hold him to answer the charge before a court having the authority to inquire by a grand jury in regard to the alleged offense. Having elected, as he says, to give bail, the justice was bound to accept it if sufficient, and he had no longer any jurisdiction over the subject-matter or over the plaintiff's person, and the proceedings of the justice were thereafter wholly without jurisdiction, and he and all else concerned therein were liable in damages to the plaintiff.

The right of the justice to proceed depends upon the construction given to the statute of 1885 above mentioned. If that statute gave exclusive jurisdiction to a Court of Special Sessions to try alleged offenders against its provisions, then the justice was right in his decision to try the plaintiff, notwithstanding his demand to be held to bail to the next grand jury.

Section 14 of the act provides that "Courts of Special Sessions shall have jurisdiction of all cases arising under this act, and their jurisdiction is hereby extended so as to enable them to enforce the penalties imposed by any or all sections thereof." The proper construction to be given this section is not now an open question. In *People* v. *Harris* (123 N. Y. 70) we have held that exclusive jurisdiction was not conferred upon Courts of Special Sessions by such language. This decision had not been made when the justice proceeded to try the plaintiff. As the statute did not confer this exclu-

sive jurisdiction upon Courts of Special Sessions, the justice was bound by the provisions of section 211 of the Code of Criminal Procedure, which directs the magistrate, when the person accused is brought before him, to inform him of his right to be tried by a jury after indictment, and in case he shall elect to be so tried the magistrate can only hold him to answer to a court having authority to inquire, by the intervention of a grand jury, into offenses triable in the county.

We think the plaintiff complied in substance with the provisions of that section when he pleaded not guilty and waived preliminary examination and offered to give bail for his appearance at the next grand jury of Jefferson county. There can be no room for any doubt that the plaintiff did by this language ask to be tried by a jury after indictment. It was the duty, therefore, of the justice to have taken bail and proceeded no further.

In trying the plaintiff, and, upon his conviction, committing him to prison, has the justice rendered himself liable in damages to the plaintiff? He did erroneously decide that he had the right to try the plaintiff, notwithstanding his demand, but has such erroneous decision rendered him as to all future acts a trespasser? The answer depends upon a matter of jurisdiction. It is not a question of jurisdiction to proceed with the trial, notwithstanding the demand, but it is a question of jurisdiction to decide whether he has or has not that right. Manifestly he does not, as a matter of law, acquire jurisdiction to proceed by deciding that he has it, but, being confronted with the question of jurisdiction, has he the power to decide it so far that his erroneous decision that he has it, exempts him from liability on the ground that he has only made a judicial error or an error of judgment upon a question of law which he was bound to decide?

In such a case as this it must be remembered that the justice had, in the first instance at all events, jurisdiction of the subject-matter, viz.: The inquiry into alleged offenses against the provisions of this act, and the trial of alleged offenders. He also had jurisdiction of the person of the plaintiff. Full juris-

diction had thus been confided to the justice over subject-matter and person at the time when the plaintiff was arraigned before him. In the absence of a proper demand and the giving of sufficient bail it was the duty of the justice, and his jurisdiction continued, to try the accused. This would seem to be a case where, jurisdiction having thus attached, the decision of the justice to try the plaintiff was only an erroneous exercise of such jurisdiction. It is unlike the case where jurisdiction has never been conferred, and the justice decides to exercise a power that he does not and never did possess. Here, in the course of proceedings which he was forced to entertain, and in the case of one over whose person he has properly acquired jurisdiction, the justice is confronted with the necessity of deciding a question depending upon the construction to be given to a statute, and that question must be decided by him one way or the other before he can take another step in those proceedings which, up to that moment, have been legally and properly pending before him, and over which he has had full and complete jurisdiction. It seems plain that his decision upon the question is one in the course of a proper exercise of the jurisdiction first committed to him, and that his error in deciding that he had jurisdiction to proceed was an error of judgment upon a question of law, and that he is, therefore, not responsible for such error in a civil action. It is unlike the case where a justice of the peace proceeded to try a civil action for assault and battery. (*Woodward* v. *Paine*, 15 John. 492.) The justice never had in such case obtained jurisdiction over the subject-matter and he could not obtain it by deciding that he had it. The case falls under the principle of law that where a judge never has had jurisdiction over the subject-matter, he acts as a trespasser from the beginning in assuming it, and his decision that he has it is no protection to him. I know it was stated in *Gordon* v. *Longest* (16 Peters, 97), in a case where the defendant took the proper steps to remove an action brought against him in the state court to the United States court and where the judge of the state court persisted, notwithstanding those steps in trying the cause, that every step

subsequently taken by the state court in the exercise of jurisdiction was *coram non judice.* Yet in such a case the question is put whether the state judge would be liable for proceeding with the case in the honest exercise of his judgment. (*Lange* v. *Benedict*, 73 N. Y. 12 at 36.) And in a case where a plea of title to real estate is put in before a justice of the peace, which ousts him of jurisdiction, would the justice be liable in case he erroneously decided that he continued to have jurisdiction? This question is also put in the course of the opinion in the case of *Lange* v. *Benedict* (*supra*) and with, as I think, a leaning on the part of the learned judge toward the position of non-responsibility. The jurisdiction existed in both cases at one period and it was on account of the steps taken in the course of the proceedings in the cases that the court or judge was called upon to say whether his jurisdiction had ceased or not. It seems to me that the erroneous decision of that question did not render the judge liable in either case. Unless the proper steps were taken the judge had power in each case to proceed and try it, and so, although the application to remove is properly made, it is addressed to the legal discretion of the judge upon the papers presented and a question of law is presented for him to decide. His erroneous decision, while conferring no jurisdiction upon him, is still such a judicial determination of a matter already properly pending before him and over which up to that moment he had jurisdiction, that he must be protected from a civil action in regard to it.

It has been held (*Butler* v. *Potter*, 17 Johns. 145) that where a justice entered judgment for more than $5 costs, when the statute prohibited judgment for more than that sum for costs, the judgment was voidable but not void. The justice had jurisdiction to give judgment for some amount, and hence his decision to give it for more than the statute allowed was not void. The case of *Prigg* v. *Adams* (2 Salk. 674) was cited as sustaining the principle. The judgment in that case was declared to be void as in violation of an act of parliament because rendered in a case arising in Bristol, where the act provided that in such a case no judgment should be entered in

a court of Westminster for less than a certain sum, and this judgment was for less. The defendant, an officer, took the plaintiff on a *ca sa* issued on the judgment, and it was held that the same was a protection to the officer. See, also, *Clark* v. *Holdridge* (58 Barb. 61).

So it has been held that granting an adjournment to the plaintiff in a Justice's Court in a case where by law he was not entitled to it, acted as a discontinuance and that the case, as between the parties, was out of court and the justice had no jurisdiction to proceed further. (*Proudfit* v. *Henman*, 8 Johns. 391.) In such case the justice, notwithstanding the adjournment, assumed to retain jurisdiction and rendered judgment and issued execution and defendant's property was sold under it. It was held that the justice was not liable as a trespasser. It was said the court had jurisdiction over the parties and over the question of adjournment, and although he had in reality no legal power to grant the adjournment, and the case was thereby discontinued as between the parties and any judgment thereafter rendered liable to be reversed, yet the justice was not liable because his decision to grant the adjournment, although in a case where he legally had no power, was yet an error of judgment and he was not liable because he had jurisdiction and was called upon to decide. (*Horton* v. *Auchmoody*, 7 Wend. 200.)

So in the case *In re Faulkner* (4 Hill, 598), it was held that in order to give jurisdiction to the officer to whom an application is made for a warrant against a person as an absconding or a concealed debtor, the affidavits of the two witnesses required by 2 R. S. 3, § 5, must state facts, and mere *information and belief will not answer*. And yet in *Harman* v. *Brotherson* (1 Denio, 537), the affidavit stated the facts only on information and belief, and it was *held* that though insufficient to sustain the order to hold to bail against a motion to set it aside, it protected an officer making the arrest against an action for false imprisonment. The court said it was a case where, upon proper proof, an order to hold to bail might be made. The officer had jurisdiction of the matter and acted

judicially in making the order, and it was clear he could not be made answerable as a trespasser for an error in judgment.

In *Stewart* v. *Hawley* (21 Wend. 552), the case arose upon the statute in regard to the observance of the Sabbath, which prohibited servile laboring or working on that day. The defendant, who was a magistrate, issued his warrant for the arrest of the plaintiff upon a complaint charging that he was on the Sabbath day personally engaged in circulating a memorial to the legislature at its next session, and upon proof made of that fact on the trial, the plaintiff was convicted of a violation of the statute. The plaintiff brought this action of trespass to recover damages, but the court held that when complaint was made the defendant was bound to entertain it and exercise his judgment on it, and whether the facts disclosed show *prima facie* a violation of the statute was a question of law for the erroneous decision of which the defendant was not liable; that he had jurisdiction to try a person for a violation of the law, and he was, therefore, compelled to decide in a case where jurisdiction over the subject-matter belonged to him.

Other cases of a somewhat similar import are cited in the learned opinion of Mr. Justice HARDIN in the court below.

We are inclined to think that this was not a case for holding the magistrate liable to an action on the part of the plaintiff in the nature of a trespass to recover damages for his illegal imprisonment.

In this case there seems to have been no question but that the justice in all that he did, acted in entire good faith.

The district attorney appeared for the people before the magistrate, and contended that the magistrate had exclusive jurisdiction to try the case under the particular statute. The justice so decided. The Court of Sessions of Jefferson county upon appeal concurred in that construction of the statute, and although the General Term of the Supreme Court came to a different conclusion, in the correctness of which we concur, it is yet manifest that there was at least color for different constructions of the terms of the act. It would be a pretty hard rule which under such circumstances should hold a magistrate

liable to be cast in damages for an honest mistake in judgment upon a question of law in a proceeding over which he had jurisdiction up to the moment when he was called upon to decide the question. It seems to us there is no public policy which demands such a measure of liability on the part of inferior magistrates, and we think we are not overruling any case in this or in the old Supreme Court. The rule is clear enough, but in this as in so many other cases the difficulty consists in its proper application.

We have, as we believe, properly applied it in this case.

We have also looked at the other questions appearing in the record, the exceptions of the plaintiff taken on the trial, and the rulings of the court thereon, and we think no error was committed calling for a new trial.

The order of the General Term granting a new trial should, therefore, be reversed and the judgment of nonsuit affirmed, with costs to the defendants in all courts.

All concur.

Order reversed and judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THE ULSTER AND DELAWARE RAILROAD COMPANY, Appellant.

Upon the trial of an action, brought by the attorney-general in the name of the people, under the Code of Civil Procedure (§ 1798), to enforce the forfeiture of the charter of a corporation, it is incumbent upon the state to show that a cause of forfeiture has not only been incurred by the defendant, but that it continues to exist, that its existence involves some public interest, and that the court has authorized the bringing of the action.

Such an action is always within the control of the state, as the sole party interested, to prosecute or abandon at its will or pleasure, and it may, through its legislature, not only discontinue the action, but waive or abolish causes of forfeiture, declare rights of action and limit the operation of the statute by forbidding the prosecution of such an action in specified cases.

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By the amendment in 1889 (Chap. 236, Laws of 1889), of the act of 1874 (Chap. 430, Laws of 1874), providing for "the reorganization of railroads sold under a mortgage," a reorganized railroad corporation no longer incurs the risk of a forfeiture of its charter by a failure to build an extension to its road so as to complete it in accordance with the original plan, after the board of railroad commissioners makes and files a certificate that, in their opinion, the public interests do not require such extension.

The effect of the amendment is to abolish the penalty which the original act imposed, and as there is no clause in the amendatory act saving pending prosecutions, all actions pending at the time of its going into effect, in which judgment had not been rendered, were left subject to the rule created by the amendment, and the certificate is a bar to the action.

In an action so brought, an extra allowance was granted. It was conceded that the only matters involved in the action was the existence of the defendant's corporate franchise, and that the extra allowance must be predicated upon the value of the franchise. The evidence showed that the corporation paid no dividends and no interest on its debt, and that its gross earnings for the previous year were insufficient to pay its operating expenses. The state, however, had imposed a tax upon "the corporate franchise and business" of the company under the act of 1881 (Chap. 361, Laws of 1881). *Held*, that the allowance was erroneous; that the tax imposed furnished no evidence of the actual value of the franchise.

Reported below, 58 Hun, 266.

(Argued June 8, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the fourth Tuesday of November, 1890, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court.

Also appeal from order of said General Term, made the fourth Tuesday of November, 1890, which reversed an order of Special Term granting an extra allowance.

The nature of the action and the facts, so far as material, are stated in the opinion.

E. Countryman for appellant. The new corporation acquired all the property rights, privileges and franchises and assumed all the corporate duties, obligations and liabilities of its predecessors, as imposed by the general law of the state. (*People ex rel.* v.

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Cook, 110 N. Y. 444; *State* v. *N. P. R. Co.*, 36 Minn. 207; 10 Ohio St. 385; 2 Morawetz on Corp. [2d ed.] § 934; *N. C., etc., R. Co.* v. *C. C. R. Co.*, 83 N. C. 489; *People* v. *O'Brien*, 111 N. Y. 254; *Mayor, etc.*, v. *T. T. S. R. Co.*, 113 id. 311; 92 U. S. 677; 94 id. 718; 117 id. 140; 75 Ill. 524; 68 id. 489; 45 Conn. 199; 96 U. S. 509; Laws of 1867, chap. 715, § 1; *In re B., etc., R. Co.*, 72 N. Y. 246; 75 id. 335; *In re K. E. R. Co.*, 105 id. 98, 115–122; *Day Case*, 107 id. 129, 139; *Beardsley* v. *Johnson*, 121 id. 225; *In re N. P. M. Co.*, 33 N. Y. S. R. 453; *In re B. E. R. Co.*, 32 id. 1065, 1066; 35 id. 451; *N. Y. C. Co.* v. *Mayor, etc.*, 104 N. Y. 33, 43.) The new company accepted the franchises and their correlative duties and obligations, if a formal acceptance be necessary, as affirmatively appears in the certificate of incorporation. But no express acceptance was necessary. "A corporation is under a legal obligation to exercise its francises, and it has not the option to discontinue a part of its road and forfeit its franchises." (*People* v. *A. & V. R. Co.*, 24 N. Y. 261, 269; *People* v. *K., etc., Co.*, 23 Wend. 193; *People* v. *F., etc., Co.*, 27 Barb. 446; *State* v. *C. I. R. Co.*, 71 Iowa, 410; *Smith* v. *People*, 47 N. Y. 330; *Moore Case*, 108 id. 98, 104; *People* v. *A., etc., R. Co.*, 24 id. 261; *Bravord Case*, 115 Ind. 1, 5; *Thomas Case*, 121 N. Y. 45; *People* v. *S. R. Co.*, Id. 582, 583.) The claim of a waiver of the forfeiture on the part of the state is frivolous. (*People* v. *P. Bank*, 24 Wend. 431; *State* v. *M. C. R. Co.*, 36 Minn. 247.) The Statute of Limitations is not a bar to the action. (Laws of 1867, chap. 775, § 1; *People* v. *B. R. Co.*, 36 N. Y. S. R. 376, 383, 384.) The act of 1889 (Chap. 236) has no application to this case, because the ground of forfeiture or cause of action existed or had accrued, and the action itself had been commenced and was pending when the act was passed. And the subsequent proceeding instituted before the board of railroad commissioners is, therefore, without pretense of authority and void. (*McMaster Case*, 103 N. Y. 547, 554; *People* v. *Supervisors*, 43 id. 103, 134; *In re Van Kleeck*, 121 id. 701; *People ex rel. Wade* v. *Strack*, 3 T. & C. 165; Endlich on Statutes,

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§ 273; *Sayre* v. *Wisner*, 8 Wend. 661; *Quackenbush* v. *Danks*, 1 Denio, 128; *Dash* v. *Van Kleeck*, 7 Johns. 478.) The act of 1889 is in manifest violation of the Constitution. (*People* v. *McDonald*, 99 N. Y. 480; *State* v. *Noble*, 118 Ind. 350–354; Cooley's Const. Lim. [4th ed.] 109, 115; *Alexander* v. *Bennett*, 60 N. Y. 204; *Anderson* v. *Reilly*, 66 id. 189; *Dash* v. *Van Kleeck*, 7 Johns. 498; Cooley's Const. Lim. 116; *Flint Case*, 25 Mich. 99; *Allor Case*, 43 id. 76; *Gough* v. *Dorsey*, 27 Wis. 119; *Atty.-Gen.* v. *McDonald*, 3 id. 805; *Gregory* v. *State*, 94 Ind. 384; *Little* v. *State*, 90 id. 338; *Schoultz* v. *McPheeters*, 79 id. 373; *Wright* v. *Defrees*, 8 id. 298; *Waldo* v. *Wallace*, 12 id. 569; *Board Case*, 65 id. 427; *Barto* v. *Himrod*, 8 N. Y. 483; *People* v. *P. Bank*, 24 Wend. 430; *People* v. *Stephens*, 71 N. Y. 527.)

George Zabriskie for respondent. This action is brought to enforce a penalty, and cannot be maintained upon any right or claim of the town of Harpersfield based upon its having been bonded under chapter 648 of the Laws of 1866 to aid in the construction of the road of the Rondout and Oswego Railroad Company, or on any other claim of that town. (*People* v. *R. R. Co.*, 103 N. Y. 95; *Vatable* v. *R. R. Co.*, 96 id. 51; *People* v. *R., W. & O. R. R. Co.*, 103 id. 95; *Sullivan* v. *P. & K. R. R. Co.*, 4 Otto, 806; *Metz* v. *B. C. & P. R. R. Co.*, 58 N. Y. 65; *People* v. *L. & N. Co.*, 120 Ill. 48–57.) The claim that, under the act of 1874, the Ulster and Delaware acquired and took not only the railroad and property connected therewith which was sold under foreclosure, and the rights, privileges and franchises appurtenant thereto, but all the rights, privileges and franchises of the old company, and thereby became in law bound to exercise all those franchises, and that a failure so to do involved a forfeiture of its corporate existence, is unfounded. (*Memphis* v. *Commissioners*, 112 U. S. 609–619; *Lord* v. *Y. G. Co.*, 101 N. Y. 614; *Coe* v. *C. R. R. Co.*, 10 Ohio St. 386–390; *Morgan* v. *Louisiana*, 93 U. S. 217; Jones on R. R. Securities, §§ 15, 16.) Even if the defendant incurred any duty or obligation

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to build the whole line of railroad which the Rondout and Oswego Railroad Company was incorporated to construct, which we deny, still, the act of 1874, chapter 430, under which the Ulster and Delaware Railroad Company is organized, imposes no penalty upon that company for failure so to do. (*People* v. *C. G. Trust*, 130 Ill. 268; *E. P. R. Co.* v. *Vaughan*, 14 N. Y. 546; *O. R. Co.* v. *O. R. Co.*, 130 U. S. 25; *Jones* v. *Estis*, 2 Johns. 379; *Bell* v. *Dole*, 11 id. 173; *Health Dep.* v. *Knoll*, 70 N. Y. 530; *F. A. Bank* v. *Colgate*, 120 id. 381; *Ferrett* v. *Atwill*, 1 Blatchf. 151; *Simpson* v. *Pond*, 2 Curt. 502; *United States* v. *Sheldon*, 2 Wheat. 119.) The defendant never incurred any duty or obligation to construct a road between Stamford and Oneonta. (Laws of 1874, chap. 430; *Johnson* v. *N. Y. C. R. R. Co.*, 49 N. Y. 455; *People* v. *A. & V. R. R. Co.*, 24 id. 261; *People* v. *R., W. & O. R. R. Co.*, 103 id. 95; *People* v. *O'Brien*, 111 id. 1; *People ex rel.* v. *Cook*, 110 id. 443; *Metz* v. *B., C. & P. R. R. Co.*, 58 id. 61; *Vatable* v. *N. Y., L. E. & W. R. R. Co.*, 96 id. 54–59; Jones on R. R. Securities, §§ 15, 16, 632; 2 Rorer on Railroads, 920; *Atkinson* v. *M. & C. R. R. Co.*, 15 Ohio St. 21; *Vilas* v. *M., etc., R. R. Co.*, 17 Wis. 497; *People* v. *L. & N. Co.*, 120 Ill. 48–57.) The act of 1874 is a remedial statute, and is to be liberally construed in favor of the defendant. (*People* v. *N. Y. C. & H. R. R. R. Co.*, 28 Hun, 543; *People* v. *B. Co.*, 89 N. Y. 85; *People* v. *O'Brien*, 111 id. 1; *G. Co.* v. *Cowdry*, 11 Wall. 459; *U. S.* v. *N. O. R. R. Co.*, 12 id. 362; *Smith* v. *People*, 47 N. Y. 330; *People* v. *Stephens*, 71 id. 528, 537.) The right of the people to institute an action to annul the existence of any of the companies, including the respondent, is barred by the Statue of Limitations, which requires such actions to be brought within two years after the cause of the action accrues. (Code Civ. Pro. §§ 384, 389; *In re B., etc., R. R. Co.*, 72 N. Y. 245; *B. S. T. Co.* v. *City of Brooklyn*, 78 id. 525; *Jones* v. *Estis*, 2 Johns. 379; *Bell* v. *Dole*, 11 id. 173; *Health Dep.* v. *Knoll*, 70 N. Y. 530; Code Civ. Pro. § 384; *Butler* v. *Johnson*, 111 N. Y. 204.) The act of 1889 is applicable

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to this action. (*People* v. *Livingston*, 6 Wend. 526; *Butler* v. *Palmer*, 1 Hill, 324; *U. I. Co.* v. *Bliss*, 4 Biss. 327; *People* v. *Stephens*, 71 N. Y. 527; *People* v. *Spicer*, 99 id. 225; *R. R. Co.* v. *Grant*, 98 U. S. 398; *Ins. Co.* v. *Ritchie*, 5 Wall. 541.) The act of 1889 does not seek to interfere with the exercise of the judicial power of the courts or the legislative power of the legislature, or to transfer any judicial or legislative power to the railroad commissioners; and if it did it would not be invalid. (*People* v. *Turner*, 117 N. Y. 227; *Embury* v. *Connor*, 3 id. 511; *Vose* v. *Cockroft*, 44 id. 415; *Houston* v. *Wheeler*, 52 id. 641; *Miller* v. *Mayor*, *etc.*, 113 U. S. 385; *In re N. Y. E. R. R. Co.*, 70 N. Y. 327, 343; *In re G. E. R. R. Co.*, Id. 361, 374; *Howard* v. *Moot*, 64 id. 262; *Martin* v. *Mott*, 12 Wheat. 19; *U. S.* v. *Ferreira*, 13 How. [U. S.] 40; *Murray* v. *H. L. & I. Co.*, 18 id. 272; *Cole* v. *State*, 102 N. Y. 48; *O'Hara* v. *State*, 112 id. 146; *Sipple* v. *State*, 16 Abb. [N. C.] 430.) The act of 1874 is repealed by the act of 1889 as far as it ever constituted a basis for this action. (Code Civ. Pro. § 1798; *U. S.* v. *Tynen*, 11 Wall. 88; *Norris* v. *Crocker*, 13 How. [U. S.] 429; *Dash* v. *Van Kleeck*, 7 Johns. 477; *People* v. *G. & S. T. Co.*, 98 N. Y. 67, 78; *Lyday* v. *Long Island City*, 104 id. 218; *People ex rel.* v. *Bull*, 46 id. 57, 68; *Ex parte McCardle*, 7 Wall. 506–514; *Ins. Co.* v. *Ritchie*, 5 id. 541; *R. R. Co.* v. *Grant*, 98 U. S. 398; *People* v. *Jaehne*, 103 N. Y. 182; Laws of 1869, chap. 917; *Butler* v. *Palmer*, 1 Hill, 324; Cooley on Const. Lim. [4th ed.] 476, 477; *Nash* v. *White's Bank*, 105 N. Y. 243; *Hughson* v. *Rochester*, 49 Hun, 45; *Yeaton* v. *U. S.*, 5 Cranch, 281; *Schooner Rachel* v. *U. S.*, 6 id. 329; *U. I. Co.* v. *Pierce*, 4 Biss. 327.) The court should not render judgment against the defendant which necessarily determines that an act of the legislature, passed for the very purpose of relieving the defendant from this doubtful claim, is invalid or inoperative, and plaintiffs must make out a very clear case to warrant the court in refusing to give effect to an act of the legislature on such grounds. (*Thompson* v. *People*, 23 Wend. 536; *People* v. *W. T. & B. Co.*, 47 N. Y. 586.)

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George Zabriskie for appellant on appeal from order. The question whether an action should be regarded as difficult and extraordinary within the meaning of the Code of Civil Procedure, rests substantially in the judgment and discretion of the judge to whom the application for an additional allowance is made, and the determination of the question involves so many considerations addressed to the discretion of the judge that the appellate court rarely interferes. The court does not encourage appeals upon mere matters of discretion. (*R. R. Co.* v. *Davis*, 55 N. Y. 145; *Bryon* v. *Durrie*, 6 Abb. [N. C.] 140; *Morrison* v. *Agate*, 20 Hun, 23; *Tolman* v. *R. R. Co.*, 31 id. 397; *Gooding* v. *Brown*, 35 id. 153.) There is nothing in the nature of the action which excludes the application of section 3253 of Code, or prevents the granting of an extra allowance if the facts warrant it. (*People* v. *A. & V. R. R. Co.*, 16 Abb. Pr. 465; *Conaughty* v. *S. C. Bank*, 92 N. Y. 401, 305; *Lattimer* v. *Livermore*, 72 id. 174; *Monroe* v. *Smith*, 23 Abb. [N. C.] 275; *Struthers* v. *Pearce*, 51 N. Y. 357.) The value of the subject-matter involved is both the value of the corporate franchise and the value of the property, because both are involved. (Code Civ. Pro. § 3253.) The allowance is to be computed upon the value of the corporate franchise. (*Conaughty* v. *S. C. Bank*, 92 N. Y. 401; *People* v. *H. Ins. Co.*, Id. 328; *Fanning* v. *Osborne*, 102 id. 441; *People* v. *B., etc., R. R. Co.*, 89 id. 75; *People ex rel.* v. *Cook*, 110 id. 443; *Warren* v. *Buckley*, 2 Abb. [N. C.] 323; *People* v. *Ferry Co.*, 7 Hun, 105; *Lattimer* v. *Livermore*, 72 N. Y. 174; *Monroe* v. *Smith*, 23 Abb. [N. C.] 275; *Burke* v. *Candee*, 63 Barb. 552.) The assessed valuation of defendant's corporate franchise for taxation is competent evidence, as between the people and the defendant, of its value as a basis for an extra allowance. (Laws of 1881, chap. 361; *People* v. *H. Ins. Co.*, 92 N. Y. 328; *C. T. Co.* v. *N. Y. C. & N. R. Co.*, 110 id. 250; *Swift* v. *Poughkeepsie*, 37 id. 511, 514; *Barhyte* v. *Shepherd*, 35 id. 238; *B. & S. L. R. R. Co.* v. *Supvrs.*, 48 id. 93; *People* v. *W. S. Bank*, 39 Hun, 525; *O. Bank* v. *Bunnell*, 10 Wend. 186; *Foster* v. *Van Wyck*, 37 N. Y. 512;

Chegaray v. *Jenkins*, 1 Seld. 376; *Woolsey* v. *Morris*, 96 N. Y. 311.) Ample evidence to prove the value of defendant's corporate property was furnished. (*Fanning* v. *Osborne*, 102 N. Y. 441; *People* v. *B., etc., R. R. Co.*, 89 id. 75.) If the case be one in which an extra allowance may be awarded, and there be no valid legal objection to the granting of an allowance, the appellate court will not interfere except where there has been a gross abuse of power on the part of the court below. (*Tollman* v. *R. R. Co.*, 31 Hun, 397; *Gooding* v. *Brown*, 35 id. 153; *Comins* v. *Supvrs.*, 3 T. & C. 296; 64 N. Y. 626; *Everingham* v. *Vanderbilt*, 12 Hun, 75.)

E. Countryman for respondents, on appeal from order. It is apparent that the word "*involved*" (in the statute) is used in a legal sense and means the possession, ownership or title to property or other valuable thing which is to be determined by the result of the action. It does not mean the property which may be either directly or remotely affected by the result. (*Conaughty Case*, 92 N. Y. 404.) The General Term having refused, in the exercise of its legitimate discretion, to grant an allowance, the order is not appealable to this court. (*Schiels* v. *Wortman*, 37 N. Y. S. R. 134.)

RUGER, Ch. J. This action was brought in the name of the people by the attorney-general to determine the corporate existence of the defendant, upon the alleged ground that it had forfeited its charter through a failure to build a portion of the railroad track which its predecessor was authorized to construct. The Rondout and Oswego Railroad Company was organized in 1866, under the General Railroad Act, to build, operate and maintain a railroad from Rondout, in Ulster county, to the village of Oneonta, in the county of Otsego; and, during the period of its existence, actually built a road from Rondout to Stamford, but failed to build that portion extending from Stamford to Oneonta. The defendant, the Ulster and Delaware Railroad Company, through a plan of reorganization adopted by the bondholders under chapter 430

of the Laws of 1874, on the sale of the property of the railroad under a mortgage foreclosure in 1875, succeeded to the rights, property and franchises of the original company. It was for the failure of the defendant to complete the railroad originally projected by the Rondout and Oswego Company that this action was brought. The action is claimed to have been authorized by the provisions of section 1798 of the Code of Civil Procedure, providing that an action may, by leave of court, be brought by the attorney-general to procure a judgment annulling the existence of a corporation created under the laws of this state when, among other things, it "has violated any provision of law whereby it has forfeited its charter, or become liable to be dissolved by the abuse of its powers, or forfeited its privileges or franchises by a failure to exercise its powers."

A violation of the provisions of this section apparently creates a cause of forfeiture and contemplates a punishment to be inflicted upon the offender, and not a benefit to be recovered by the prosecutor. No absolute right to enforce a forfeiture for the causes specified is conferred upon any party, but it is made to depend upon certain conditions. The statute does not execute itself, but requires the action of the attorney-general to make it effective. Even the willful neglect of a railroad corporation to exercise all its franchises does not, of itself, terminate its corporate existence; but, to effect that result, the state, through its attorney-general, must not only elect to enforce the forfeitures, but also procure leave from the court to bring an action for that purpose. (Code of Civil Procedure, § 1798; *People* v. *A. & V. R. R. Co.*, 24 N. Y. 261; *People* v. *N. R. Sugar Refining Co.*, 121 id. 582.)

Such actions are not even then maintainable, except some public interest is involved which requires the exercise of the franchise by the corporation. (*People* v. *N. R. Sugar Refining Co.*, *supra*.)

It was, therefore, incumbent upon the state to show upon the trial of the action that a cause of forfeiture had not only been incurred by the defendant, but that it continued to exist,

and that its existence involved some public interest, and also that the court had authorized the bringing of the action. An action thus commenced is, even then, necessarily always within the control of the state, as the sole party interested, to prosecute or abandon at its mere will and pleasure. (*People* v. *Phœnix Bank*, 24 Wend. 431.)

It is responsible to no one for the exercise of its discretion in this respect, and can, through the action of its legislature, not only discontinue an action brought by it, but can also repeal or confirm charters; waive or abolish causes of forfeiture; release rights of action, and limit the operation of its statutes upon individuals and corporations at its own will. By enforcing the forfeiture of corporate existence, the state receives no benefit and acquires no property, and by waiving such forfeiture it loses no privilege and interferes with no vested right. Having the absolute power at will to take the corporate life, it does not hamper its freedom of action by forbidding its servants in specified cases from prosecuting actions for forfeiture. It requires no exercise of judicial power to enable it to waive a forfeiture, but it may be effectuated by the mere expression of its will, and its will may be based upon cause or utterly without one. Having absolute power as the supreme representative of the people in respect to the question, it may do so with or without cause, or upon whatever terms or conditions it may see fit to impose.

It is claimed by the defendant that the state, by the enactment of chapter 236 of the Laws of 1889, amending chapter 430 of the Laws of 1874, has so changed the original statute that a reorganized railroad corporation no longer incurs the risk of forfeiting its charter, when the railroad commissioners certify that no public interest is involved in the completion of a road as originally projected.

The act is as follows: "Nothing herein contained shall be construed to compel a corporation organized under this act to extend its road beyond the portion thereof constructed at the time said corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners

shall certify that, in their opinion, the public interests, under all the circumstances, do not require such extension. If said board shall so certify and shall file in their office such certificate, * * * said corporation shall not be deemed to have incurred any obligation so to extend its road, and such certificate shall be a bar to any proceedings to compel it to make such extension, or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever."

By this enactment the state has indicated in the most imperative form its will in respect to such actions. It thereby declared that the certificate of the railroad commissioners to the effect that no public interests were involved should thereafter be a conclusive answer to any attempt to annul the existence of a reorganized railroad corporation for a failure to make an extension of its road. By this act the state devolved upon the railroad commissioners the duty, previously performed by its attorney-general, of inquiring whether the public interests required it to enforce an alleged forfeiture against a reorganized railroad corporation, and necessarily thereby deprived other departments of the government of the power of determining the preliminary question upon which the action of the state in instituting and prosecuting such actions must be founded.

By leaving to another department of the state the determination of a question upon which its own action was thereafter to be controlled, it neither delegated legislative power to, or conferred judicial functions upon, such department. It simply instituted an *ex parte* inquiry to determine its own future action as had been the uniform practice of the state government for many previous years. The question whether the public interests are involved is always a condition precedent to the right of maintaining any action by the attorney-general for the forfeiture of corporate rights, and the state by this act says that it will hereafter leave this question in certain cases to the railroad commissioners to determine, instead of to the attorney-general by whom it had theretofore been decided.

In other words, it has made the railroad commissioners' certificate conclusive evidence of the non-existence of any sufficient ground of forfeiture. After the filing of such certificate the law prescribing a forfeiture of its charter by a reorganized railroad company for an omission to build an extension of its road, ceases to operate thereon and practically abolishes the penalty which the act of 1874 imposed in certain cases. This does not give to the act a retroactive operation; but there being no clause in the act of 1889 saving pending prosecutions or existing rights from the effect of the statute, by settled rules the abolition of the penalties left all actions in which judgments had not been obtained subject to the rule created by the amended statute alone. (*Nash* v. *White's Bank of Buffalo*, 105 N. Y. 243.)

We are of the opinion, therefore, that the certificate of the railroad commissioners filed under the act of 1889, to the effect that no public interest required the extension of the defendant's railroad, was a bar to this action.

We are also of the opinion that the order denying the motion for an extra allowance was correctly determined. By section 3253 of the Code of Civil Procedure, the court is authorized in difficult and extraordinary cases, where a defense has been interposed, to award to any party a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject-matter involved. It is conceded that the matter involved in the action was the existence of the defendant's corporate franchise, and that alone, and a claim for an extra allowance must, therefore, be predicated upon the value of the franchise. The trial court awarded an allowance of fifteen hundred dollars to the defendant, and must, therefore, have determined that the corporate franchise was at least of the value of thirty thousand dollars. The undisputed evidence showed that the corporation paid no dividends on its stock, and no interest on its debts, and that its gross earnings were insufficient to pay its operating expenses in the year 1889. This evidence certainly did not show affirmatively that the corporate franchise had any definite value.

It is, however, claimed that because the state imposed a tax upon "the corporate franchise and business" of the company, under chapter 361 of the Laws of 1881, some evidence was furnished by the state of the value of the franchise. We are of the opinion that this tax furnished no evidence of the fact upon which a claim to an additional allowance can be based.

The act provides that in the case of non-dividend-paying railroads, a tax shall be imposed upon their corporate franchise and business at the rate of "one and one-half mills upon each dollar of a valuation of the capital stock." This value is usually estimated by the comptroller from data furnished by the officers of the company, and in the year 1889, upon a capital stock of $1,152,100, was estimated to be of the value of $41,602.50, yielding a tax of about sixty dollars per annum. It is thus apparent that the sum assessed under this provision is an arbitrary amount based upon the amount of its capital stock, without reference to the value of its franchise. A tax upon the corporate franchise and business of a railroad is also authorized by the same act to be computed upon its gross earnings at the rate of five-tenths of one per cent upon each dollar of such earnings.

It will thus be seen that both these taxes are imposed arbitrarily, upon certain data having no reference to the actual value of the franchise, and, therefore, furnish no evidence of such value. While the act of 1889 apparently assumes that the franchises and business of all railroads subject to taxation are of some value, it would be quite erroneous to make so vague and indefinite an assumption the basis of a judicial inquiry as to the actual value of a railroad franchise.

The judgment and order appealed from should both be affirmed, with costs.

All concur.

Judgment and order affirmed.

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FREDERICK HABERMAN, Respondent, *v.* JOHN O. BAKER, Appellant.

Although it is a matter of discretion with a court of equity as to whether it will enforce a contract for the purchase and sale of lands, it is a discretion which proceeds in its exercise upon settled rules and not arbitrarily, and if notwithstanding all the legal questions raised by objections or suggested from the records, the vendor is found to have the legal title to the premises and a legal right to convey as he has agreed, performance by the vendee must be decreed.

It seems **the vendor's right to enforcement of such a contract should be considered more favorably than in the case where the proceeding is to compel the purchaser at a judicial sale to carry out his bid.**

Where a highway is the dividing line between the lands of two adjoining proprietors, each owning to the center, and one of them conveys, bounding the lands along or upon the highway, in the absence of an express reservation in the deed, of his property in the highway, the deed conveys the fee to the center, subject to the public easement.

Where the grantor owns the fee of the soil of the whole highway, in the absence of facts raising a presumption of a contrary intent, the presumption is that the grantor intended to and the conveyance will be deemed to convey the fee of the whole highway.

In either case, where by the abandonment of public easement the highway ceases to exist, the land comprising it reverts to the primary condition of ownership and of use, and becomes a parcel of the adjoining property, and the grantee is entitled to the possession of that portion conveyed by his deed.

Where, therefore, certain lands in the city of New York were conveyed, bounded on the westerly side by an old road, title to the center whereof was in the grantor, and on the north by a road leading eastwardly from the other, title to the whole of which was in the grantor, and where, in the subsequent laying out and opening of city streets, the public use of pieces or gores of land, parts of the old road included in said titles, was abandoned, *held*, that the right to such use reverted to the successor in title to said grantee; that he had a full title to and right to convey the land bounded by the new streets; and so, was entitled to a judgment requiring a specific performance of a covenant for the purchase thereof.

It seems**, the rule is different where the description in a deed bounds the land by the side of the highway, or where there is a city street the title to which is in the municipality.**

It seems **that where, upon foreclosure of a mortgage belonging to the estate of a decedent, the mortgaged premises are bought in by the personal representatives, they take on the character of the mortgage indebtedness, and so are as personalty in his hands, which he may dis-**

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pose of, and for which he is liable to account as such; and this is so, although the decedent left a will which confers no power upon his executors to sell real estate.

The heirs of the decedent, therefore, or his residuary devisees, take no direct interest therein, and it is not essential in order to convey a good title for them to join in a conveyance of the premises.

Nor is such joinder required because of the fact that the mortgagee took possession of the mortgaged premises, unless it appears that such possession had been for a sufficient length of time to give title by adverse possession.

(Argued June 4, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York entered upon an order made February 12, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action to compel the specific performance by defendant of a contract for the sale of real property.

The facts appear in the opinion.

Robert Sturgis for appellant. Samuel Stillwell never conveyed the land in what was known as Stillwell's road. The fee of the land is still in his heirs, subject, perhaps, to a right of way over the road. (*Hussner* v. *B. C. R. R. Co.*, 96 N. Y. 18; *Hall* v. *W. W. P. Co.*, 24 Wkly. Dig. 494; *Bookman* v. *Kuzzman*, 94 N. Y. 272; *Mott* v. *Mott*, 68 id. 246; *Sloat* v. *McDougal*, 9 N. Y. Supp. 631; *Burr* v. *Mills*, 21 Wend. 290; *Oakley* v. *Stanley*, 5 id. 523; *Bissell* v. *N. Y. C. R. R. Co.*, 23 N. Y. 61; *Perrin* v. *N. Y. C. R. R. Co.*, 36 id. 120; *People* v. *Colgate*, 67 id. 512; *White's Bank* v. *Nichols*, 64 id. 65; *English* v. *Bremar*, 60 id. 609; *K. C. F. Ins. Co.* v. *Stevens*, 87 id. 287; *Story* v. *N. Y. E. R. R. Co.*, 90 id. 161, 162, 180, 183; *People ex rel.* v. *Jones*, 112 id. 597.) That the title is, to say the least, open to judicial doubt and, therefore, not marketable, and it is now well settled that where the vendor fails to show he has a marketable title that a purchaser will not be compelled to specifically perform. (*Schriver* v. *Schriver*, 86 N. Y. 584.)

Opinion of the Court, per GRAY, J.

Samuel Untermeyer for respondent. The intention and effect of the deeds from Stillwell to Bowne and Charlton was to convey the fee of the property in Stillwell road and the fee in the adjoining half of the Bloomingdale road. (*In re Ladue*, 118 N. Y. 213; *Bissell* v. *N. Y. C. R. R. Co.*, 23 id. 61; *Wager* v. *T. U. R. Co.*, Id. 526; *Perrin* v. *N. Y. C. R. R. Co.*, 36 id. 120; *Wallace* v. *Fee*, 50 id. 694; *Mott* v. *Mott*, 68 id. 246; *K. C. F. Ins. Co.* v. *Stevens*, 87 id. 287; *Story* v. *N. Y. E. R. R. Co.*, 90 id. 122, 161; *French* v. *Carhart*, 1 id. 96; *Putzel* v. *Van Brunt*, 8 J. & S. 501; *Livingston* v. *Ten Broeck*, 16 Johns. 14; Cowen & Hill's Notes to Phillips on Evidence, No. 526, p. 802; *Champlin* v. *Pendleton*, 13 Conn. 23.) Conceding it to be true, that after the conveyance to Bowne, Stillwell laid out a road running along his own property, his deed to Charlton would then convey the fee of the entire road-bed. (*In re Robbins*, 34 Minn. 99; *Taylor* v. *Armstrong*, 24 Ark. 102.) The heirs or devisees of William Edgar who, it is said, was at the time of his death a mortgagee in possession of the property mortgaged to him, can have no possible interest in the gore north of the old Stillwell road. (*Runyan* v. *Mersereau*, 11 Johns. 535; *Kortright* v. *Cady*, 21 N. Y. 344.) All of the objections urged by the defendant are cured by adverse possession. (Code Civ. Pro. §§ 369, 370.)

GRAY, J. In this action, which was brought to compel the defendant to perform his part of an agreement with plaintiff and to complete his purchase of the plaintiff's land, various objections to the plaintiff's title were raised and have been more or less discussed. If any of them are substantial, the defendant should not, of course, be compelled to accept the title tendered by plaintiff. Whether equity will enforce the specific performance of such contracts is a matter resting, it is true, in discretion; but it is a discretion which proceeds in its exercise upon settled rules and not arbitrarily. Where the case is one in which the proceeding is against the purchaser at a judicial sale to compel him to carry out his bid, the discre-

tion of the court may be influenced differently from a case like the present, where the action is upon the private contract of the parties. But this is just; for, in the former case, the bidder is warranted in assuming not only that the title to the land is readily marketable, but also that the judgment of the court has set at rest all questions which might reasonably be raised concerning the validity of the title offered. In all cases, I suppose that the quality of the title must be the same; but where the deliberate convention of private parties results in a contract for the sale and purchase of lands, the matter of the plaintiff's right to an enforcement of that contract should be considered more favorably; and if, notwithstanding all the legal questions raised by objections, or suggested from the records, the vendor is found to have the legal title to the premises and has a legal right to convey, as he has agreed, performance by the vendee must be decreed. That precise rules can be laid down to be observed in the various cases, where the object is to compel the specific performance of agreements for the sale and purchase of lands, I doubt, and their necessity is not apparent. The discretion of courts in such cases, to cite the observation of Lord ELDON in *White* v. *Damon* (7 Vesey, 35), and which Sir John Romilly, Master of the Rolls, quotes in *Haywood* v. *Cope* (25 Beavan, 140), "must be regulated upon grounds that will make it judicial."

In this case, the objections relate to the plaintiff's title to and right to convey certain pieces of land, which formerly were included in highways, since abandoned. His contract was to sell a distinct parcel, or block of land, lying between 86th and 87th streets, the boulevard and the 10th avenue in the city of New York. At about this point, an old highway, known as the Bloomingdale road, skirted, on the west, the lands, of which this block is a part, and in laying out the boulevard, the old highway was here mainly taken in. From the Bloomingdale road, at about where 87th street meets the boulevard, there led off to the eastward a way which was known as Stillwell's road or lane. As a consequence of the alteration of lines, caused by opening and regulating the boulevard, 87th

street and the 10th avenue, pieces or gores of land were added to the property of the plaintiff's grantors to form the present block, to which, from their having previously constituted parts of the abandoned highways, the title is deemed to be in the heirs of Samuel Stillwell.

Originally, Samuel Stillwell owned the farm or tract of land, of which the block now in question once formed a part, and the lane, or road, bearing his name was built by him for purposes of convenience of access for himself and to other adjoining parcels of land, which he had sold to various parties. It ran wholly upon his own lands and partly upon the northerly margin of the premises in question. For some distance eastwardly from the Bloomingdale road, the land on the other, or northerly, side of this lane belonged to other owners. The first conveyance made by Stillwell, in the chain of this title, was made in 1803, to John Charlton. The description of the premises conveyed bounded them "along the Bloomingdale road" and, where they adjoined Stillwell's road, "along said road * * * to the Bloomingdale road." By such a description a grantor usually is deemed to convey the fee of the soil to the centre of the road, where it is the dividing line between properties. In the absence of some express reservation by a grantor of his property in a road, such as would be implied where an easement over it was alone granted and the description ran to and along the side of it, as it was in *Jackson* v. *Hathaway* (15 Johns. 447), or, later, in the case of *Mott* v. *Mott* (68 N. Y. 246), a conveyance of lands, generally bounded as along or upon a road, will convey the fee to its centre. (See *Jackson* v. *Hathaway*, *supra*.)

A recent decision of this court, in its Second Division, made with respect to another part of Stillwell's property, has settled this question of what passed of this private road, in the case of a grantee of land adjoining and where the description of the grant was "along the lane of said Stillwell intended for a road, etc." It was held that under the deed the fee of the soil was granted to the centre of the road when built. (*Matter of Ladue*, 118 N. Y. 213.)

Opinion of the Court, per GRAY, J.

To complete the title to all of Stillwell's road, the plaintiff attempts to deduce a title to the further half through the original conveyance of lands made by Stillwell to R. L. Bowne, in November, 1795, which comprised a tract extending from the Bloomingdale road eastwardly and along the land subsequently laid out and used as a lane. In this deed there was no reference to any road and the only ground for presuming anything with regard to its dedication, or existence, at that time, was that in a conveyance of other parts of Stillwell's property, subsequent in time to Bowne's, a map annexed thereto showed this lane as laid out. As this map bore a date earlier than that of the deed to Bowne, the plaintiff argues that Bowne's conveyance must have been with reference to the road as shown thereby. I think, however, that such an inference is hardly permissible from the mere fact of the date. Something further was required as proof concerning the map, or of the laying out of the road, in order to engraft upon the grant to Bowne any such additional right of property. But it is not necessary to depend upon that line of argument, in aid of the plaintiff's title to the land formerly comprised within the abandoned highway. From the proofs I think we must assume that Stillwell conveyed to Bowne with no reference to this lane. The question then is whether, as the road was laid out upon Stillwell's land, a title in fee to the whole road-bed did not pass to Charlton, or his grantees, subject only to any easements in its use as a road. This question I think must be answered in the affirmative. That any property in the northerly half of the road should have remained in Stillwell, or his heirs, would require the support of some presumption bearing upon his interests, or relating to some necessity in fact; the elements of which, I think, we cannot find. The only interest in the lane, or in its maintenance as such, was possessed by Stillwell's grantees. He had parted with all of his land bordering on the lane. The natural presumption, and one which seems to flow from the established rules, would be that, in bounding his grant to Charlton along this highway, Stillwell had conveyed his fee in the road-bed. Where the highway

divides two properties the owner of each abutting piece is presumed to own to the centre of the way. The presumption is based on the idea that the adjacent owners originally contributed the land for the road, and this presumption assumes that nothing militates against it in the facts of ownership. But if the grant of the abutting property went only to the side of the road, or the public authorities are vested with the right to the soil of the street, the presumption cannot exist. (*Dunham* v. *Williams*, 37 N. Y. 251.)

Where the highway has been, as in the present case, wholly made from and upon the margin of the grantor's land, his subsequent grant of the adjoining land should be deemed to comprehend the fee in the whole road-bed; upon the same principle that exists for giving the fee to the centre in the other cases. The grantor should be presumed to have intended by his conveyance the full investiture of the grantee with all appurtenant property rights in the highway. What other intention could be consistently supposed? In the early case of *Jackson* v. *Hathaway* (*supra*), it was observed that there was reason for intending that the parties to a conveyance of property bounded along or upon a highway meant to the middle of the highway. Would there not be equally reason for the legal intendment that they meant the whole highway, where it was the property of the grantor in its entirety? Can we suppose an intention in the grantor to reserve to himself, or to his heirs, the fee in half of the highway? I think not.

As to the grantor, the control and beneficial use of the road have ceased to be of importance, but to the grantee they must be important, if not essential, for many patent reasons. The case of *Bissell* v. *Railroad Company* (*supra*), though applied to a case where the question of title related to only half of the street, is authority for the proposition that there is no reason to infer an intention in the grantor to withhold his property in, or title to, the land covered by the highway, after parting with all his right and title to the adjoining land.

Our attention has been directed to several cases in the courts of other states, where this question has been discussed and

similarly decided, and in some of them the reasoning is upon the authority of *Bissell* v. *Railroad Company*. (See *In re Robbins*, 34 Minn. 99, and *Taylor* v. *Armstrong*, 24 Ark. 102, and, as well, *Watrous* v. *Southworth*, 5 Conn. 305; *Champlin* v. *Pendleton*, 13 id. 23.)

I am, therefore, of the opinion that under Stillwell's grant to Charlton, the ownership of the soil of Stillwell's road, where adjacent to the property granted, passed to the grantee as a parcel of the grant. So long as the road was required as such and an easement had been acquired by the public, the ownership of its soil may have been subjected to the use. But when, after the year 1846, the public easement had been abandoned and the highway ceased to exist, the land comprising it reverted to primary conditions of ownership and of use, and became a parcel of the adjoining property, from which it was taken originally. The fee in the land of Stillwell's lane being in the plaintiff, and because of the description of the grant as to the Bloomingdale road, questions as to the title to the gore, produced by the change in the westerly line of the tract by the laying out of the new boulevard, are disposed of. The ownership of the land in the lane carried the fee to the centre of the Bloomingdale road opposite to the lane, and that, with the description along the Bloomingdale road, comprehended the gore in question.

In 1847, Eighty-sixth street (but not Eighty-seventh street) having been theretofore legally opened and in use, an agreement as to a division of lands was made between John Adams, then in possession of the property composed of the block in question, and Herman LeRoy Edgar, in whom had become vested the legal title to the lands north of Stillwell's road. The effect of that agreement was to make the south side of Eighty-seventh street (subsequently opened), from the boulevard to Tenth avenue, *pro tanto*, a division line between their properties. But the appellant interposes certain objections as to the title of LeRoy Edgar and affecting his right to conclude other interests in the lands by such an agreement. After Bowne had acquired the title to the tract of land, of which a

portion bordered upon the north side of Stillwell's road, he mortgaged the same in 1809 to William Edgar as security for the repayment of a loan. Upon a sale, decreed in proceedings instituted, after the mortgagee's death, to foreclose the mortgage, the premises were purchased by Herman LeRoy Edgar in his individual name. He was, however, at the time the administrator, with the will annexed, of William Edgar, the deceased mortgagee, and it is argued that he acquired the title to the premises purchased in the capacity of trustee for those interested in the testator's estate, and that releases were needed to cut off their interests. The point is not tenable, however; for, though it is true that he held the property in trust, nevertheless the premises so acquired took on the character of the mortgage indebtedness, and were as personalty in the administrator's hands, which he could dispose of and was liable to account for as such.

The case of *Lockman* v. *Reilly* (95 N. Y. 64, 71) is sufficiently in point as to this. In that case it was held that whether the executors took a deed in their names as such executors, or in their individual names, was immaterial. The testator's heirs could take no direct interest in the land so purchased, and could not dispute the title of a purchaser from the executors, and this would be so, it was said, even though no power of sale might be contained in the will.

Another objection raised by the appellant is that the mortgagee Edgar had taken possession, and had become seized of the property by a title, which descended to his heirs and was not affected by the mortgage foreclosure. The point is not discussed, and does not seem serious. It need be but briefly adverted to in answer. It seems to me to be sufficient to say that while it is true that the mortgagee went into possession of the mortgaged premises, the possessory right gained thereby was to satisfy the mortgage debt out of the property mortgaged. Had the debt been paid before any adverse title had been gained, the possessory right would have ceased and the mortgagor would have been entitled to repossess himself of the property. But upon the foreclosure of the mortgage

by the executor of the mortgagee, it not only appeared that Bowne, the mortgagor, had regained possession of the mortgaged premises within 18 years of the time that his mortgagee had entered, but all claims to any interest therein were expressly waived, except for the amount due upon the bond and mortgage. Further than this, it is to be observed that it was found as a fact by the trial court that the devisees of William Edgar, Jr., to whom Edgar, Sr., the mortgagee, had bequeathed and devised his residuary estate, in which were comprehended the mortgage interests in question, had conveyed all their right, title and interest to the grantee Herman Le Roy Edgar. As that grant conveyed the lands, which included the premises in question, and by boundaries as rearranged under the agreement of division between said Edgar and Adams, the plaintiff's predecessor in interest, any possible claims outstanding in William Edgar, Jr.'s, devisees were relinquished, and their conveyance quieted all questions as to any land which, by the rectangulation of the line of the south side of 87th street, would be left between it, the westerly side of 10th avenue and the north line of what was the old Stillwell lane.

I have discussed those objections which seemed to me to offer any legal questions requiring an expression of opinion, and I think neither they nor any others are material, or disclose any flaw in the plaintiff's title. The appellant, therefore, should be compelled to perform his contract.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

MARIA STELZ, Respondent and Appellant, *v.* MINNIE SHRECK, Respondent and Appellant.

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Where land is conveyed to husband and wife without any express restriction as to the character of their holding, they take as tenants by the entirety.

As such tenancy is founded upon the marital relation and upon the legal theory that the husband and wife are one, it depends for its continuance upon the continuance of the relation, and when the unity is broken by a divorce the tenancy is severed; each takes a proportionate share of the property as a tenant in common.

There is no implied condition annexed to an estate by the entirety that the grantees shall remain faithful to the marriage vow, or that either shall not by misconduct cause a severance of the marital relations, and a decree of divorce granted because of adultery does not vest the whole title in the innocent party.

(Argued June 10, 1891; decided October 6, 1891.)

CROSS-APPEALS from order of the General Term of the Supreme Court in the first judicial department, made April 17, 1891, denying motions of both plaintiff and defendant Shreck for a new trial on exceptions taken under section 1001 of the Code of Civil Procedure.

This was an action for the admeasurement of dower.

In 1886 premises in the city of New York were conveyed by deed to William Stelz and Minnie Stelz, his wife. Subsequently William obtained a divorce upon the ground of his wife's adultery. He thereafter married the plaintiff and died intestate. The plaintiff claimed dower in the whole of the land. The defendant, Minnie Schreck, formerly Minnie Stelz, claimed that the tenancy by the entirety created by the deed, was unaffected by the decree of divorce, and that upon the death of her former husband the whole estate vested in her.

George H. Knacht for plaintiff. The deed to William Stelz and Minnie, his wife, created an estate by the entirety, and the consideration for the interest said wife received in said estate from her said husband was her vow of fidelity, and she, as the wife of William Stelz, took the same upon condi-

tion implied in law that she would remain faithful to all the solemn obligations of the marriage relations; and upon breach of this implied condition and a judgment dissolving the marriage in consequence of said breach, she forfeited her interest in said estate. (2 Black. Comm. 152, 183; 2 Washb. on Real Prop. 3; 1 Kent's Comm. 530; *Riggs* v. *Palmer*, 115 N. Y. 511; 1 R. S. 741, §§ 8, 15.) Absolute divorce from the bonds of matrimony has the same operation and effect as the death of the guilty party. (Schouler on Husband and Wife, § 558; *Hyhley* v. *Allen*, 3 Mo. App. 524; *Wood* v. *Simmons*, 20 Mo. 363; *Renwick* v. *Renwick*, 10 Paige, 424; *Lewis* v. *Sleator*, 2 Ia. 609; *Barber* v. *Root*, 10 Mass. 260; *Wigney* v. *Wigney*, 7 Prob. Div. 177; *Barclay* v. *Waring*, 58 Ga. 86.) The guilty wife should not be rewarded for bringing about an absolute divorce for her adultery by having half of her former husband's property bestowed upon her, to enjoy the same in common with her paramour, her subsequent husband. (*Piper* v. *Hoord*, 107 N. Y. 82.) The defendant, Minnie Schreck, is estopped by her own wrongful conduct from claiming title to the premises in question or any part thereof. (Bigelow on Estoppel, 370; Herman on Estoppel, §§ 731, 733, 740, 791; 2 Story's Eq. Juris. §§ 1533, 1544; *Riggs* v. *Palmer*, 115 N. Y. 511.)

Edward W. Scudder Johnston and *Lewis S. Goebel* for defendant Shreck. Where lands are conveyed to husband and wife without the use of any express words in the deed as to how they shall take, they do not take as joint tenants, nor as tenants in common, but as tenants by the entirety; both are seized of an entirety or whole, and neither of them can dispose of any part without the assent of the other, and the whole goes to the survivor. In such a case the survivor takes no new acquisition, but under the original limitation his estate being simply freed from participation by the other. (2 Kent's Comm. [7th ed.] 110; Challis on Real Prop. 304; *Jackson* v. *McConnell*, 19 Wend. 175; *Doe* v. *Howland*, 8 Cow. 277; *Fairchild* v. *Chastelleux*, 1 Penn. St. 176; *Stuckey* v. *Keefe*,

Statement of case.

26 id. 397; *Washburn* v. *Burns*, 34 N. J. L. 18; *Lux* v. *Hoff*, 47 Ill. 425; *Ross* v. *Garrison*, 1 Dana, 242; *Bertles* v. *Nunan*, 92 N. Y. 152; *A. Ins. Co.* v. *Rest*, 40 Mich. 241; *Chandler* v. *Cheney*, 37 Ind. 398; *Barnes* v. *Lloyd*, Id. 524; *Gibson* v. *Zimmerman*, 12 Mo. 386; *Dean* v. *M. E. R. Co.*, 119 N. Y. 546.) There is nothing in the statutes of this state which deprives a woman of a vested right acquired by her during her coverture, even though her husband obtained a divorce from her for her adultery, except that she loses her dower in his lands, and in the absence of any such statutory forfeiture the land in question remained vested in the defendant Minnie Schreck, and she became seized of the whole premises on the death of said William Stelz by the fact of the survivorship by virtue of the conveyance to them, notwithstanding the discontinuance of the marital relations. (*Erkenbach* v. *Erkenbach*, 96 N. Y. 456; *Pray* v. *Stebbins*, 141 Mass. 221; *Wait* v. *Wait*, 4 N. Y. 100; *In re Ensign*, 103 id. 284; *Chase* v. *Chase*, 55 Me. 21; *Clark* v. *Fosdick*, 118 N. Y. 7; *Galusha* v. *Galusha*, 116 id. 635; *Sandford* v. *Sandford*, 45 id. 723; *Draper* v. *Jackson*, 16 Mass. 479; *Jackson* v. *McConnell*, 19 Wend. 177; *Joos* v. *Fey*, 30 N. Y. S. R. 147.) The intent of this conveyance was to vest an estate in the defendant Minnie Schreck at the time of the delivery of said deed in the lands so conveyed whereby she took the whole estate with her husband William Stelz, and also took a vested right to take the whole estate freed from his interest in case she should survive him, as subsequently happened. (*Ames* v. *Norman*, 4 Sneed. 696; 1 Bishop on Married Women, § 621; *Gillespie* v. *Worford*, 2 Cold. 653; *Beach* v. *Hollister*, 3 Hun, 519; 1 Washb. on Real Prop. [5th ed.] 708; *Thornton* v. *Thornton*, 3 Rand. 182; *Jacobs* v. *Miller*, 50 Mich. 120.) William Stelz not having parted with his interest during his life-time or otherwise severed this estate, the defendant Schreck, as survivor, became vested with the whole at his death. (Laws of 1880, chap. 472.)

S. Jones for guardian *ad litem*.

Opinion of the Court, per PECKHAM, J.

PECKHAM, J. We agree in this case with the views expressed by the learned judges who delivered the opinions at the Special and General Terms of the Supreme Court. The sole question arises out of the decree of divorce which the husband obtained from his first wife on account of her adultery.

Did that divorce have any, and if so what, effect upon the character of the holding of the real property by the former husband and wife? By the conveyance the husband and wife took an estate as tenants by the entirety. (*Bertles* v. *Nunan*, 92 N. Y. 152; *Zorntlein* v. *Bram*, 100 id. 13.)

Such a tenancy differs from all others. In one respect it is like a joint tenancy, in that there is a right of survivorship attached to both, but it is not a joint tenancy in substance or form. (*Barber* v. *Harris*, 15 Wend. 615; *Jackson* v. *McConnell*, 19 id. 175; *Bertles* v. *Nunan*, *supra*.)

It originated in the marital relation, and although the survivorship presents the greatest formal resemblance to joint tenancy, instead of founding the estate by the entirety upon the notion of joint tenancy, all the authorities refer it to the established effect of a conveyance to husband and wife pretty much independent of any principles which govern other cases. (*Jackson* v. *McConnell*, *supra*.)

At common law husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. These two real individuals, by reason of this relationship, took the whole of the estate between them, and each was seized of the whole and not of any undivided portion. They were thus seized of the whole because they were legally but one person. Death separated them, and the survivor still held the whole because he or she had always been seized of the whole, and the person who died had no estate which was descendible or devisable.

Being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, when that unity is broken, not by death, but by a divorce *a vinculo*, it stands to reason that such termination of the marriage tie must have some effect upon an estate which requires the marriage

relation to support its creation. The claim on the part of the counsel for the first wife is that it is only necessary the parties should stand in the relation of husband and wife at the time of the conveyance, and at that time the estate vests, and no subsequent divorce can affect an estate which is already vested. But the very question is, what is the character of the estate which became vested by the conveyance? If it were of such kind that nothing but the termination of the marriage by the death of one of the parties could affect it, then of course the claim of the counsel is made out, but it is an assumption of the whole case to say that the estate was of the character he claims. When the idea upon which the creation of an estate by the entirety depends is considered, it seems to me much the more logical as well as plausible view to say that as the estate is founded upon the unity of husband and wife, and it never would exist in the first place but for such unity; anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage and the consequent unity of person. An absolute divorce terminates the marriage and unity of person just as completely as does death itself, only instead of one as in the case of death there are in the case of divorce two survivors of the marriage, and there are from the time of such divorce two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is that the tenancy by the entirety is severed, and a severance having taken place each takes his or her proportionate share of the property as a tenant in common without survivorship. It is said that in such case it ought to be a joint tenancy, but I see no reason for that claim. As it has been held that seizin by the entirety does not create a joint tenancy either in substance or form (19 Wend. *supra*), and as a tenancy by the

entirety depended wholly upon the marital relationship, there can be no reason why the seizin should be turned into a joint tenancy by virtue of the very fact which terminated the unity of persons upon which the right of survivorship is itself founded, and to which it owed its continued existence.

It is true that a conveyance of this kind, if made to two persons who were not husband and wife, would, at common law, have created a joint tenancy. But our statute provides that every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy. (1 R. S. 727, § 44.) This statute did not reach an estate by the entirety, nor did the statutes of 1848 and 1849, and 1860 and 1862. (*Bertles* v. *Nunan*, *supra*.) It, therefore, still exists under our law.

We have seen, however, that a tenancy by the entirety is not a joint tenancy in form or substance. Upon what principle should the termination of a tenancy by the entirety resulting from an absolute divorce, be changed into a joint tenancy in the face of our statute relating to joint tenancies? The conveyance did not expressly declare that the tenancy was to be a joint tenancy, and, therefore, when the original character of the tenancy by the entirety is changed, it cannot be transformed into that of a joint tenancy without a clear violation of our statute.

The counsel for the defendant urges that we are giving by this decision a retroactive effect to a decree of divorce in a case not warranted by the statute, and in violation of the well-settled rule in this state as to the effect of such a decree. He says that we change the effect of the deed of conveyance and that the decree of divorce not only severs the unity of person from the time of its entry, but that we allow it to date back to the date of the conveyance, and to give an effect to such conveyance that it did not have at the time of its execution. We think not.

We do not at all question the contention of the defendant's counsel that a decree of divorce in this state only operates for the future, and has no retroactive effect or any other effect

than that given by the statute. But we hold that the character of the estate conveyed was such in its creation that it depended for its own continuance upon the continuance of the marital relation, and when that relation is severed as well by absolute divorce as by death, the condition necessary to support the continuance of the original estate has ceased, and the character of the estate has for that reason changed. The estate does not revest in the grantor or his heirs, for no such condition can be found in the law or in the nature of the estate, and it must, therefore, remain in the grantees, but by an altered tenure. Their holding is now a holding of two separate persons, and for the reasons already given such holding should be by tenancy in common and of course without any survivorship.

I think the contention that the first wife is entitled to the whole of the estate as the survivor of her husband cannot be maintained. Although the question is new in this state, it has been somewhat debated in the courts of some of the other states. In *Harrer* v. *Wallner* (80 Ill. 197), and *Lash* v. *Lash* (58 Ind. 526), and *Ames* v. *Norman* (4 Sneed, 683), similar views to those we have herein stated are set forth. A contrary decision has been made in Michigan in the case of *Lewis*, reported in 48 Northwestern Reporter at 680. We have read the opinion in that case, but we feel that our own view is more in accord with legal principles, and we cannot, therefore, follow it.

Upon the defendant's appeal, the judgment ought to be affirmed.

Upon the appeal of the plaintiff, her counsel contends that there is a condition annexed to the estate by the entirety which is implied by law, and the condition is that each of the grantees shall remain faithful to the obligations of the married state and shall not by his or her misconduct cause a dissolution of the marriage relation upon which the estate depends. I find no warrant for implying any such condition in the character of the holding, and still less for the result which, as he claims, flows from a violation of such condition. Its violation (judicially determined) results according to the plaintiff's argument,

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in the immediate vesting of the whole estate in the innocent party to the marriage, just the same as if the other party thereto were actually dead instead of divorced. None of the authorities treats the estate as dependent upon any such condition, and however proper it might be to enact by legislative authority a condition of that nature, this court has not that power.

It is unnecessary to add anything further to the views which have been expressed by the learned judges of the Supreme Court in this case, and we are of the opinion that the judgment appealed from should be affirmed, and as neither party appealing has succeeded here, the affirmance should be on both appeals, without costs.

All concur, except EARL, J., dissenting, and FINCH, J., absent.

Judgment affirmed.

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AMBROSE THOMPSON et al., Appellants, *v.* JOHN B. SIMPSON et al., as Executors, etc., Respondents.

The effect of a request by both parties upon trial of an action for a direction of a verdict in his favor is to clothe the court with the functions of the jury; if the party, whose request is denied, does not thereupon request to go to the jury on the facts, a verdict directed for the other party stands, as would the finding of a jury for the same party in the absence of any direction, and the review, upon appeal to this court, is governed by the same rules as apply in cases of verdicts rendered without direction; all controverted and inferable facts will be deemed conclusively established in favor of the party for whom the verdict was directed.

A general warranty in a deed, not limited by other parts thereof, however it technically operates, is only consistent with an intention of the grantor to convey the whole estate.

The rule that there is no estoppel where an interest passes, does not apply to conveyances intended to pass the whole title, although the grantor had a limited interest which was carried by the conveyance.

The Statute of Frauds is not an obstacle to the enforcement by a court of equity of the doctrine that the owner of land may by his acts preclude himself from asserting his legal title against one who, in reliance thereon, has placed himself in a position where to allow the legal owner of the

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land to assert his right would operate as a fraud upon the other party; that court will not permit a statute made for the prevention, to be used as an instrument, of fraud.

It seems, a party is concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and which did so influence it, where such denial would operate to the injury of the latter.

It seems also, an estoppel may arise, although there was no designed fraud on the part of the person sought to be estopped; it may arise also where there is a duty to speak and the party upon whom the duty rests has an opportunity and knowing the circumstances requiring him to speak, keeps silent, and it is not necessary that the duty to speak should rest upon any agreement, or legal obligation; it arises whenever principles of natural justice require the disclosure.

The owner, however, of property, which another has assumed to convey without authority, is not precluded by mere silence from subsequently claiming it. There must have been an occasion and duty to speak, and it must appear that such omission, upon opportunity presented, was intentional, or in negligent disregard of the plain dictates of conscience and justice.

The mere fact that another may act to his prejudice, if the true state of things is not disclosed, does not render silence culpable, or sufficient to estop the true owner; he owes no duty of active diligence to protect the other party from injury. There must be a standing by and encouragement or acquiescence by the true owner in acts inconsistent with his right, knowing that the other party, acting under a false impression, is about to do what will result in his injury.

The doctrine of equitable estoppel, when invoked to bar the legal title to land, should be cautiously applied, and only when the grounds for its application are clearly and satisfactorily established.

Where, however, one without title or authority from the real owner to sell, assumes to sell and convey land in fee, and the owner, knowing the facts, consents to and does accept the proceeds of the sale in full satisfaction of his interest, this operates as a confirmation of the unauthorized sale, and precludes the owner from asserting his legal title.

"Mary E.," the wife of T., died in 1845 seized of certain premises in the city of New York, the title to which vested in her upon the death of E., her mother. The title descended upon the death of "Mary E." to her five infant children, subject to the life estate of her husband, as tenant by the curtesy; he married again, his second wife having the same baptismal name and middle initial as the first, *i. e.*, "Mary E." In 1853 T. and his wife joined in a warranty deed of the premises, her name being given therein as "Mary E." T. represented to the grantees that his wife named in the deed was the sole surviving child of E. and that the property belonged to her, and in the deed the devolution of title

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was recited. The grantees purchased in good faith, paying a consideration, which was the full value of the premises. The grantees took possession, built upon and thereafter transferred the property, neither they nor their successors in interest having any knowledge of the fraud or the defect in their title until after the death of T. who died in 1882. In an action of ejectment thereafter brought by the children of the first wife, *held*, that the grantees of T. acquired under their deed only his life estate; that the title of the children was unaffected by the fraud committed by him, and the deed was no obstacle to a recovery by them of their inheritance on the termination of the life estate; also that their right of action did not arise until after the death of their father, and so that the Statute of Limitations was not a bar to the action; that the execution by him of a deed purporting to convey a greater estate than he possessed did not operate as a forfeiture of that estate (1 R. S. 739, § 145), but passed it to the grantees.

The trial court found, upon evidence sufficient to sustain the findings, that the consideration received by T. went into other property which the plaintiffs, with knowledge of the facts, accepted in substitution for their interests. *Held*, that plaintiffs were thereby precluded from asserting their title; that while the death of T. only conveyed his life estate, it purported to convey and it was the intent of the grantors to convey the entire fee, and so, the grantees were entitled to avail themselves of the equities growing out of the disposition of the proceeds.

The provision of the Revised Statutes (1 R. S. 739, § 143), providing that no greater interest shall pass by a grant or conveyance than the grantor himself possessed or could lawfully convey at the time of the delivery of the deed, although it undertakes to convey a larger interest, was simply intended to do away with the common-law doctrine whereby a feoffment by a life tenant or by a person in possession of lands, and other common-law modes of assurance by fine and delivery, had the power of creating an estate in fee, divesting the title of the true owner.

(Argued June 9, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 16, 1891, which affirmed a judgment in favor of defendants, entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

This was an action of ejectment.

The facts, so far as material, are stated in the opinion.

James R. Cox for appellant. By the deed of A. W. Thompson and his wife, Miss Ritchie, in 1853, to Glover, no greater

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interest passed than the grantors possessed, *i. e.*, the life estate as tenant by the curtesy. (1 R. S. 739, § 143; *Sparrow* v. *Kingman*, 1 N. Y. 248; *Sage* v. *Cartwright*, 9 id. 50; 5 R. S. 333; 1 id. 674, § 32; *Preston* v. *Smith*, 13 Johns. 407; *Bradstreet* v. *Huntington*, 5 Pet. 402; *Clapp* v. *Bromagham*, 9 Cow. 552; *Varick* v. *Briggs*, 6 Paige, 324; *Spofford* v. *Manning*, 6 id. 383; *Donaldson* v. *Wood*, 22 Wend. 397; *Waller* v. *Harris*, 20 id. 561; *Patterson* v. *Winn*, 11 Wheat. 385; *Rogers* v. *Bradshaw*, 20 Johns. 744; *M'Cartee* v. *Orphan Asylum*, 19 Cow. 507; 1 Kent's Comm. 463; *Rexford* v. *Knight*, 15 Barb. 642.) Neither of the plaintiffs has ever aliened, exchanged or encumbered his estate in 44 Hudson street. (*McCoon* v. *Smith*, 3 Hill, 148; 1 Perry on Trusts, §§ 107, 111; *Chapin* v. *Shafer*, 49 N. Y. 412; *McKean* v. *Boycott*, 2 H. Black. 511; Schouler on Dom. Rel. 533; *U. S.* v. *Bainbridge*, 1 Mason, 82; 2 Kent's Comm. 191, 195; *McGarr* v. *Marshall*, 7 Humph. 121; *Tucker* v. *Moreland*, 10 Pet. 69, 70; *Beardsley* v. *Hotchkiss*, 96 N. Y. 211; *Bergen* v. *Udall*, 31 Barb. 375; *Wood* v. *Robinson*, 22 N. Y. 564; *M. Bank* v. *Atwater*, 2 Paige, 59; 1 Story's Eq. Juris. § 793*d*; *Jeffrey* v. *Jeffrey*, 1 C. & P. 141; *Callaghan* v. *Callaghan*, 8 C. & F. 401; *Dillon* v. *Coppin*, 4 M. & C. 627, 670, 671; Willard's Equity, 263; *Duvoll* v. *Wilson*, 9 Barb. 488.) The defendants can find no defense in the doctrine of latent or implied covenant. (*Mead* v. *Bunn*, 32 N. Y. 278; *D. C. Co.* v. *P. C. Co.*, 8 Wall. 276; *Booth* v. *Cleveland*, 74 N. Y. 15; *Bruce* v. *Fulton Bank*, 79 id. 154; 16 Hun, 615; *Frost* v. *Raymond*, 2 Caines, 188; *Vandekar* v. *Vandekar*, 11 Johns. 122; *Kingman* v. *Sparrow*, 1 N. Y. 257; *Jackson* v. *Hubbell*, 1 Cow. 613; *Jackson* v. *Bradford*, 4 Wend. 622; *Jackson* v. *Waldron*, 13 id. 178; Perry on Trusts, § 270.) There is no evidence of ratification, acceptance, confirmation or adoption by either of the children of these acts of their father. (*Boerum* v. *Schenck*, 41 N. Y. 190; *Cumberland* v. *Sherman*, 30 Barb. 575; Lewin on Trusts, 96, 402; *Nixon* v. *Palmer*, 8 N. Y. 401; Paley Agency, 171; *Owings* v. *Hull*, 9 Pet. 629; *Boyden* v. *Boyden*, 9 Met. 519; *Adair* v. *Trimmer*, 74

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N. Y. 554; *Beardsley* v. *Hotchkiss*, 96 id. 211; *Baldwin* v. *Burrows*, 47 id. 211; 2 Greenl. on Ev. § 367; *Wilson* v. *Tuminan*, 6 M. & G. 236; Smith on Cont. 287, 379; 1 Pars. on Cont. 325; *Proctor* v. *Sears*, 4 Allen, 95; *Thrupp* v. *Fielder*, 2 Esp. 628; Schouler on Dom. Rel. 532, 584, 585; *Voorhies' Case*, 24 Barb. 153; *Henry* v. *Root*, 33 N. Y. 536; Bigelow on Fraud, 362, 363; *Fitchett* v. *Adams*, 2 Strangs, 1128; *Goodtitle* v. *Woodward*, 3 B. & A. 424; *Right* v. *Cutthell*, 5 East, 491; *Doe* v. *Walters*, 10 B. & C. 626; *Solomon* v. *Dawes*, 1 Esp. 83–115; *Coles* v. *Bell*, 1 Campb. 478; *Combs* v. *Scott*, 12 Allen, 496; *Fellows* v. *Commissioners*, 36 Barb. 659; *Smith* v. *Kidd*, 68 N. Y. 142; *Bennecke* v. *L. Ins. Co.*, 105 U. S. 361; *Padgett* v. *Lawrence*, 10 Paige, 181; *Jackson* v. *Miller*, 6 Cow. 756; *Walker* v. *Dunspaugh*, 20 N. Y. 170; *Jackson* v. *Sherman*, 6 Johns. 19; *Jackson* v. *Cary*, 16 id. 302; *Jackson* v. *McVey*, 15 id. 234; *Law* v. *Merrills*, 6 Wend. 268; *Garrison* v. *Aiken*, 2 Barb. 25; *Hadden* v. *Silk Co.*, 1 Daly, 388.) There is no element of estoppel in this case. No defendant has ever acted upon anything said or done by plaintiffs. (*Trenton Bank* v. *Duncan*, 86 N. Y. 229, 230; *Lawrence* v. *Brown*, 5 id. 401; *Brown* v. *Bowen*, 30 id. 541; *Favil* v. *Roberts*, 50 id. 225, 581; 2 Pars. on Cont. 793; *Trustees* v. *Smith*, 118 N. Y. 640; *Adair* v. *Lott*, 3 Hill, 186; Willard on Real Estate, 359; *Jackson* v. *Parker*, 3 Johns. Ch. 124; *Jackson* v. *Thompson*, 16 Johns. 293; *Jackson* v. *Norton*, 18 id. 355; Code Civ. Pro. § 415; *Christie* v. *Gage*, 71 N. Y. 189; *Devyr* v. *Shaefer*, 55 id. 446; *Melvin* v. *Locks*, 16 Pick. 137; *Graham* v. *Luddington*, 19 Hun, 246; *Bennett* v. *Garlock*, 79 N. Y. 302; *Learned* v. *Tallmadge*, 26 Barb. 443; *Clute* v. *N. Y. C. & H. R. R. R. Co.*, 120 N. Y. 273; 2 Story's Eq. Juris. §§ 972, 1046; *Acton* v. *Woodgate*, 3 M. & K. 492; *Wallwyn* v. *Coutts*, 3 Meriv. 707; 3 Sim. 14; *Antrobus* v. *Smith*, 12 Ves. 39; *Garrard* v. *Lauderdale*, Id. 1; *Lane* v. *Husband*, 14 Sim. 656; 1 Perry on Trusts, §§ 107, 114; *Dooper* v. *Noelke*, 5 Daly, 413; *Meigs* v. *Meigs*, 15 Hun, 453.) The learned judge at Circuit erred in admitting the evidence of Glover. (*Loeb* v. *Willis*, 100 N. Y. 235; *Capron* v.

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Thompson, 86 id. 419; *Muldoon* v. *Pitts*, 54 id. 269; *Arthur* v. *Griswold*, 55 id. 400; *Guernsey* v. *Miller*, 80 id. 181; *Eben* v. *Lorillard*, 19 id. 302; *Eriches* v. *DeMill*, 75 id. 374; *Worrall* v. *Parmele*, 1 id. 519; *Shorter* v. *People*, 2 id. 192; *Taylor* v. *Church*, 8 id. 452; *Ashley* v. *Marshall*, 29 id. 494; *Brisbane* v. *Parsons*, 43 id. 200; *Anderson* v. *Rome*, 54 id. 334; *Cole* v. *Raymond*, 9 Gray, 217; 1 R. S. 739, § 143.) The learned judge erred in denying the motion for a new trial. (73 N. Y. 119; 34 id. 301; *Platt* v. *Platt*, 58 N. Y. 647; *McMurray* v. *McMurray*, 66 id. 181; *Miller* v. *Wood*, 116 id. 351.) Subsequently acquired knowledge of the plaintiffs, silence, recognition, even tacit acquiescence, short of the Statute of Limitations, are of no account. (*Tucker* v. *Moreland*, 10 Pet. 78; *Green* v. *Green*, 7 Hun, 492; 69 N. Y. 553; *Jackson* v. *Carpenter*, 11 Johns. 543; *Adair* v. *Brimner*, 74 N. Y. 553, 554.)

Calvin Frost and *R. L. Sweezy* for respondents. The children of Mary Evelina Thompson having ratified, confirmed and adopted the deed from Ambrose W. Thompson and wife, to John H. Glover and wife, with full knowledge of all the facts and circumstances attending their father's fraud upon the Glovers, those who are still living, and the other plaintiffs who represent those of the children who have died, are concluded or estopped by such ratification, confirmation and adoption of the deed, and cannot recover possession of the property. (*Maple* v. *Kussart*, 53 Penn. St. 318; *Shoble* v. *Smith*, 8 Watts. 280; *Herques* v. *Marti*, 85 N. Y. 609; *Town* v. *Needham*, 3 Paige, 546; *Wendle* v. *Van Rensselaer*, 1 Johns. Ch. 353; *T. B. Co.* v. *Duncan*, 86 N. Y. 229.) By reason of the acceptance by the children of Mary Evelina Thompson from Ambrose W. Thompson of an equivalent for their property, the title to which he had assumed to convey to the Glovers with covenant of warranty, their estate and interest in the property to which the warranty related became so far vested in their warrantor as to inure by way of estoppel to his grantees. (*House* v. *McCormick*, 57 N. Y. 310; *Taft* v.

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Munson, Id. 97; *Cole* v. *Raymond*, 9 Gray, 217; *Russ* v. *Alspaugh*, 118 Mass. 378.) Even supposing, that the plaintiffs have a good cause of action herein, the defendants would have recourse against Ambrose W. Thompson or his estate on his warranty, and the latter would be entitled to recover from the plaintiffs the same property which the plaintiffs claim from the defendants, which last recovery would inure to the defendants' benefit. (*Averill* v. *Wilson*, 4 Barb. 187; *Jackson* v. *Bradford*, 4 Wend. 622; *Jackson* v. *Bull*, 1 Johns. Cas. 90.) Plaintiffs seek to avoid the operation of the Statute of Limitations, by alleging the life estate of their father, who did not die until 1882, and the consequent suspension of their right of entry upon the premises in question; to this the defendants answer the forfeiture of the estate of the father of plaintiffs upon the execution of the deed to the Glovers, April 28, 1853. (Code Civ. Pro. § 467; *Ward* v. *Morrow*, 82 N. Y. 265; *Eastman* v. *P. M. R. Assn.*, 65 N. H. 713; *Peters* v. *Bain*, 123 U. S. 696.) The objections made to the testimony of John H. Glover are not sufficient. (*Stevens* v. *Brennan*, 79 N. Y. 254.)

ANDREWS, J. The title to the lot on Hudson street in the city of New York, the subject of this action, vested in 1837, on the death of Evelina Hammond, in her daughter, Mary Evelina Thompson, wife of Ambrose W. Thompson, in fee, and upon her death, in 1845, descended to their five infant children, one son and four daughters, subject to the life estate of her husband, as tenant by the curtesy, who survived her and died in 1882.

Ambrose W. Thompson, in 1847, about two years after the death of his first wife, intermarried with Mary Ewing Ritchie, his second wife, she having the same baptismal name and the same middle initial as the deceased wife, both being by marriage, Mary E. Thompson. This action was brought, in 1887, by the surviving children of Mary Evelina Thompson, and the representatives of the deceased children, against the defendants, to recover possession of the premises under the title

derived from Mary Evelina Thompson. The defendants claim title to the lot under a warranty deed executed by Ambrose W. Thompson (the father) and Mary E. Thompson, his second wife, to John H. Glover and his wife, Helen L. Glover, in April, 1853. The consideration of the conveyance to the Glovers was $10,000, the full value of the fee, which was paid by the grantees to Ambrose W. Thompson. A manifest fraud was perpetrated on the Glovers by him. They purchased in good faith, supposing that Mary E. Thompson, named in the deed, was the same Mary E. Thompson who, in 1837, had inherited the lot from her mother, Evelina Hammond. Ambrose W. Thompson informed them at the time of the purchase that Mary E. Thomson, named in the deed, was the sole surviving child of Evelina Hammond, and that the property belonged to his wife, and in the deed the devolution of the title on Mary Evelina Thompson was recited.

The Glovers took possession under the deed, and in 1857 they erected a new brick building on the lot at an expense of $16,000, and in 1858 conveyed the lot to one Smith for the consideration of $28,000, whose executors, in March, 1882, conveyed it to John B. Simpson, the defendants' testator, for $32,000, who subsequently thereto, but at what time does not appear, expended a sum exceeding $3,000 in improvements on the property. Neither the Glovers nor any of their grantees had any notice or suspicion of the fraud of Ambrose W. Thompson, or of any defect in their title, until about the time of the commencement of this action. In 1853, when the deed to the Glovers was executed, Ambrose Thompson, the eldest child of Ambrose W. and Mary Evelina Thompson, was an infant of the age of sixteen years, and the youngest child was of the age of eight years. The children then had no knowledge of the deed.

It is evident from these conceded facts that the Glovers acquired under the deed from Ambrose W. Thompson and his second wife only the life estate of Ambrose W. Thompson in the lot in question, and that the title in fee of his children, subject only to the life estate of the father, was unaffected by

the fraud committed on his grantees. No conveyance made by the father could impair their title. The Glovers, as the result of the transaction, were defrauded out of their money by Ambrose W. Thompson, except to the extent of the value of his life estate, and the deed to the Glovers was no obstacle to the recovery by the children of their inheritance on the termination of the life estate of their father. They have never parted with their title by any deed or conveyance. But it is claimed that by reason of certain facts which will be stated, the Glovers and those who have succeeded to their title have retrieved their loss and have acquired an equitable title to the lot in fee, which they are entitled to enforce against the children, in whom the legal title was and is indisputably vested, notwithstanding the Statute of Frauds, which requires a deed or conveyance in writing to pass a freehold interest in lands, except in cases not now material to be noticed. (2 Rev. St. 135, § 6.)

What disposition was made by Ambrose W. Thompson of the consideration received from the Glovers, does not distinctly appear. It is claimed by the defendants that he used it in the purchase of a house and lot on Murray Hill in the city of New York. The claim rests upon very vague evidence. It was shown that in September, 1857, Ambrose W. Thompson had title to a house and lot on Murray Hill, but there is no evidence when he acquired it. In that year he exchanged this house and lot with John A. Dix for property in Rye, Westchester county, the Rye property being estimated in the exchange at the value of $25,000. Dix took the Murray Hill house and lot at the price of $10,000 (the same amount for which Thompson had sold the Hudson street lot), and at the request of Ambrose W. Thompson, conveyed the Rye property to his son Ambrose, taking back from the latter a mortgage of $15,000, the sum remaining due to him on the exchange.

In the same month Ambrose W. Thompson procured a declaration of trust to be prepared by his attorneys and caused it to be executed by the son, which was recorded in West-

chester county September 26, 1857, at the same time with the deed from Dix. This declaration of trust is an important document in the case. It recites the ownership by Mary Evelina Thompson at the time of her death in 1845, of a certain house and lot in Hudson street (without describing it), and then proceeds as follows: "And, whereas, the said Ambrose W. Thompson has, since the death of his said wife, caused the said real estate and premises to be sold and conveyed, and then received and has since held, used and controlled the purchase-money thereof upon the distinct understanding, declaration and agreement that he held the same for the use and benefit of Ambrose Thompson, Emily Thompson, Mary Thompson, Margaret H. Thompson and Julia Thompson, children of the said Ambrose Thompson and Mary Evelina, his wife, to whom said house and lot descended on the death of their said mother, Mary Evelina; and whereas, the said Ambrose W. Thompson afterwards became seized of a certain dwelling-house on Madison avenue, in the city of New York, which house and lot he hath lately sold and conveyed to John A. Dix, of the town of Rye, Westchester county, in exchange for certain lands and premises described as follows (describing them), and the said Ambrose W. Thompson hath caused the conveyance of (the Rye property) to be executed by the said John A. Dix and Catharine Morgan, his wife, to one Ambrose Thompson by warranty deed in fee simple, bearing date the 15th day of August, 1857; and whereas, the sole purpose of such conveyance to me was to protect and secure to the said children of said Ambrose W. Thompson and Mary Evelina, his wife, the use and enjoyment of an amount of property equal to that left them by their said mother, as aforesaid, and to that end that I should hold and become seized of said lands and premises in trust for myself and the said Emily, Mary, Margaret H. and Julia, etc., and to carry such purpose into effect I have promised and agreed to hold the same upon the said trust, and have accepted said deed and taken possession of the said premises as such trustee; now, therefore, I, the said Ambrose Thompson, do hereby declare, signify and agree to and with the said

Ambrose W. and the said Emily, Mary, Margaret H. and Julia, that I and my heirs and assigns do, shall and will from henceforth stand seized and possessed of the said above-described lands and premises, so as aforesaid conveyed by John A. Dix and Catherine Morgan, his wife, to me, in trust for the use and benefit of myself and the said (four sisters) and of our heirs and assigns forever. And I do also agree and covenant to pay over to them, the said Emily, Mary, Margaret H. and Julia, the proceeds of the said lands and premises until the youngest of them shall arrive at the age of twenty-one years, at which time, or such earlier time as may be proper, I will convey the same to them, their heirs and assigns in fee simple," etc.

When this declaration of trust was made Ambrose Thompson, who executed it, was under twenty-one years of age. The father at the time, as the evidence tends to show, was insolvent and pressed with debts. He directed the entire transaction; the conveyance from Dix to the son and the execution by him of the declaration of trust. It does not appear that the sisters of Ambrose knew of the declaration of trust at the time, or that they ever at any time saw it, nor does it appear that any of the children were then cognizant of the circumstances of the conveyance of the Hudson street lot to the Glovers. The declaration of trust recites that Ambrose W. Thompson "had caused the lot to be sold." The natural inference which would be drawn from the recital by one unacquainted with the circumstances, is, that by due authority of the court or otherwise, the father had conveyed the interest of his infant children.

The trial judge, in directing a verdict for the defendants, found that the consideration received by Ambrose Thompson on the sale of the Hudson street lot went into the purchase of the Murray Hill lot and finally into the Rye property. It is said that the recital in the declaration of trust warrants this inference, although the fact is not directly asserted therein. It is also insisted that the children knew this to be the fact. One Tuthill, who had been employed by Dix as a gardener on the Rye property, and who remained on the place for two or

three weeks after the Thompson family came there in 1857, testified to hearing a conversation between the father and the four girls at meal-time, in which Emily the eldest, then nineteen years of age, said "her father took her mother's money to buy that place (Rye) and gave it to her brother Ambrose." Also, "that they had a very handsome property on Murray Hill and her father had traded it away for that island." He also testified that two or three years afterwards he went to the house to fix some sashes and heard Emily say "they had cheated her out of her part; that she had nothing, only as they had a mind to let her stay there; the place belonged to her brother Ambrose; that her father gave the deed when he traded with John A. Dix, in Ambrose's name, instead of giving it in the children's name; that her father had cheated the girls out of that property and sold it all to her brother; that her mother had left her an interest, but her father had taken it away; that it was on Murray Hill the property her father had traded off." The testimony of this witness was given thirty years after the alleged conversations, and it does not appear that in the meantime they had ever been recalled to his attention. Mrs. Hewson, another witness for the defendants, with whom Mary, the second daughter lived for five years prior to her death in 1870, testified that Mary spoke of the Rye property and said that she had an interest in it which she had inherited from her mother. As further evidence upon this point, it is insisted that the children knew at least as early as 1868 (when they joined in a conveyance of the Rye property) of the declaration of trust, since the presumption is that they had read it and knew the recital therein.

The history of the Rye property after its conveyance to Ambrose Thompson in 1857, has an important relation to the case. The father, Ambrose W. Thompson, removed there with his family soon after the purchase from Dix in 1857, and lived upon the premises for a period of five or six years, and then removed with his daughters to Washington, and he never again occupied the place. The father paid the interest on the $15,000 mortgage to Dix up to March 1, 1860, and

from that time the interest accumulated so that at the date of the decree of foreclosure of the mortgage October 16, 1867, there was due thereon $21,125.53. In April, 1865, Ambrose Thompson, without the knowledge of his sisters, and presumably at the request of his father, executed a second mortgage on the Rye property to one Davids for $6,000, to secure a debt of the father. In April, 1866, Ambrose Thompson executed in his individual name and as trustee for his sisters, to one Stewart, a written contract of sale of the Rye property, subject to the Dix mortgage, in which there was a special covenant on the part of the vendor that no consideration had been paid for the Davids mortgage. In the report of the referee in the surplus proceedings taken after the sale on the foreclosure of the mortgage (which was put in evidence by the plaintiffs), it is stated that "the contract was duly delivered to Stewart for a good and valuable consideration and that Stewart assigned the same by parol to one Bonney (claimant of the surplus) for a good and valuable consideration, before the execution of the deed given in pursuance thereof, and that on or about the 18th day of October, 1867, Ambrose Thompson and his four sisters, in compliance with the terms of said contract and in satisfaction thereof, made and executed a deed to Bonney." The report also states that when the deed was delivered to Stewart, the name of Bonney was not inserted therein, but was afterwards inserted under the direction of an attorney, and that the sisters of Ambrose Thompson entrusted the deed to him and authorized him to use the same as it was used, and that he knew when it was delivered to Stewart that Bonney's name was to be inserted as grantee. The referee further found that the deed was delivered by Stewart to Bonney in payment for money advanced by Bonney to him, exceeding the amount of the surplus money. The surplus was $5,486.92, which was awarded and paid to Bonney, the claim under the Davids mortgage having been overruled. The Bonney deed, which expressed a consideration of $60,000, was dated October 18, 1867, three days after a decree of foreclosure of the Dix mortgage had been entered, and was

executed by Ambrose Thompson individually and as trustee for his sisters, and also by each of his sisters.

It does not appear distinctly that the children of Ambrose W. Thompson have received anything from the Rye property, or that the consideration for the contract of sale made with Stewart was any benefit derived by them, except that Mrs. Hewson testified that Mary signed the deed to Bonney at the request of Stewart, who informed her at the time that the deed was for money advanced by him to her and her sisters, and that witness also testified that Mary said she and her sisters had received large sums of money from Stewart. Mrs. Hewson also testified that she knew that Mary and her sisters had received money from him. It appears that Stewart had business relations with Ambrose W. Thompson, and the witness said that the father was out of the country when the advances were made by Stewart, and that Mary was under the impression that it was her father's money he was giving her. On the day of the execution of the deed to Bonney, Ambrose W. Thompson addressed a letter to his son, requesting him to execute the deed presented by Mr. Stewart.

When the children first knew of the fraud committed by their father in the sale to the Glovers does not appear. The husband of one of the daughters testified that in 1872, his wife told him that her mother had died leaving this property (Hudson street lot) in her own name, and the step-mother having the same name, had sold the property. No notice was ever given by any of the children to the persons in possession of the Hudson street lot of their claim of title, until about the time of the commencement of the action. It does not appear that they knew who was in possession, or that any improvements had been or were being made on the property.

Upon the conclusion of the evidence each party asked the court to direct a verdict in his favor, and the court thereupon directed a verdict for the defendants. The question to be determined is whether this direction was justified. The effect of a request by each party for a direction of a verdict in his favor clothed the court with the functions of the jury, and it is

well settled that in such case where the party whose request is denied, does not thereupon request to go to the jury on the facts, a verdict directed for the other party stands as would the finding of a jury, for the same party, in the absence of any direction, and the review in this court is governed by the same rules as apply in cases of ordinary verdicts rendered without any direction. All the controverted facts and all inferable facts in support of the judgment will be deemed conclusively established in favor of the party for whom the verdict was directed. (*Koehler* v. *Adler*, 78 N. Y. 287.)

The plaintiffs established an unquestioned legal title to the premises in controversy. Whether, upon the facts proved, construed most favorably for the defendants, a case was made upon which, according to the principles of courts of equity, the plaintiffs are prevented from asserting their legal title against the defendants, is the real point in controversy. The case is important as between the parties, and still more important because it involves in its wider aspects a question affecting the security of all titles to real property, and a consideration of the circumstances under which a legal title may be practically subverted and lost, although the true owner has never executed any deed or conveyance of or any writing agreeing to convey his land.

The counsel for the plaintiffs raises a point which may properly be considered before proceeding further with the discussion. It is in substance that the deed to the Glovers neither passed nor purported to pass any greater interest in the Hudson street lot than the life interest of Ambrose W. Thompson, and that, therefore, the question whether the proceeds of the sale were applied by the father to the benefit of his children, is an immaterial consideration. The Glovers, it is said, got all they bought or paid for, and they or their grantees have no concern with and no rights or equities growing out of the disposition of the proceeds. Much stress is put by counsel upon the statute declaration (1 Rev. St. 739, § 143), that "no greater estate or interest shall pass by any grant or conveyance hereafter executed than the grantor himself pos-

sessed at the delivery of the deed, or could then lawfully convey, except that every grant shall be conclusive as against the grantor and his heirs claiming from him by descent." There can be no doubt that the conveyance to the Glovers operated in law to convey the life estate of the grantor only. The section of the statute quoted is a statutory declaration of the inapplicability to our modes of conveyance of the doctrine of the ancient common law, whereby a feoffment made by a life tenant, or by a person in possession of lands, although his possession was wrongful, had the transcendent power of creating an actual estate in fee in the feoffee, divesting the seizin and title of the true owner, and leaving him or those entitled in expectancy a right of action only. This "and the other common-law modes of assurance by fine and recovery, had the power of creating estates where none existed before, only limited by the will of the grantor at the time of the grant, although they might be subsequently defeated by an action." (Co. Litt. 370a; *Sparrow* v. *Kingman*, 1 N. Y. 250; 2 Smith's L. C. 730; Reviser's Note to § 143.) Under our statute no such consequence can follow. The title and estate which passes under a grant or conveyance, is commensurate only with that existing in the grantor, although he may undertake to convey, and the deed purports to convey a larger estate. His conveyance cannot affect interests in remainder, and divests no estate except his own. While it is true, therefore, that Ambrose W. Thompson could only in law convey his life estate, and the Glovers only acquired that estate, the other part of the proposition of the counsel for the plaintiffs that the deed purported to convey that estate only, is untenable. The *quantum* of estate intended to be conveyed by a deed is to be ascertained from its language. The deed of Ambrose W. Thompson was not limited to a life estate, nor was it a quit claim only of his interest in the land. The deed in form was a conveyance of the land to the grantees, their heirs and assigns, and this, unexplained by the context, imports a conveyance of the entire fee. It contains a covenant of general warranty, whereby Thompson and his then wife covenant

to warrant and forever defend the land "against all and every other person or persons whomsoever lawfully claiming or to claim the same." The intention of the grantor to convey an absolute fee is apparent not only on the face of the deed, but the extrinsic fact that the consideration paid by the Glovers was the full value of the fee, is additional and conclusive evidence of the intention. It cannot be doubted that if Ambrose W. Thompson had subsequently acquired the title in remainder, vested in the children, it would have inured to the benefit of the Glovers and their grantees, under the familiar doctrine of estoppel by deed. Whether a general warranty in a deed, not limited by recitals to a particular and limited estate, has the efficacy of actually vesting a subsequently acquired title of the warrantor at the moment of its acquisition, in his grantee, or as some claim, the warranty operates as a rebutter only of any subsequent claim of the grantor to the warranted premises, is not here material. A general warranty, not limited by other parts of the deed, however it technically operates, is only consistent with an intention of the grantor to convey the whole estate. The rule found stated in some of the books that there is no estoppel where an interest passes, according to the modern cases, has no application to conveyances intended to pass the whole title, although the grantor had a limited interest which was carried by the conveyance. (*House* v. *McCormick*, 57 N. Y. 310; 2 Smith's L. C. 692; *Long Island R. R. Co.* v. *Conklin*, 29 N. Y. 572.) The contention, therefore, that the deed to the Glovers purported to convey only the life estate of the grantor cannot be supported.

It is convenient in this connection to refer to a contention of the defendant in support of the defense of the Statute of Limitations. That contention is that at common law a conveyance by a tenant for life of the fee, or of a greater estate than he possessed, operated as a forfeiture of the estate actually vested in the grantor, and authorized those in remainder to immediately maintain an action to be let into possession. It is, therefore, insisted that the Statute of Limitations was put in motion against the plaintiffs as soon as the conveyance of

Ambrose W. Thompson to the Glovers was executed, or as soon at least as they attained their majority, which latter event occurred as to the youngest child, more than twenty years prior to the bringing of the action. Another section of the statute is a complete answer to this claim. It declares (1 Rev. St. 739, § 145) that "A conveyance made by a tenant for life or years of a greater estate than he possessed or could lawfully convey shall not work a forfeiture of his estate, but shall pass to the grantee all the title, estate or interest which such tenant could lawfully convey." The protection intended to be conferred on the grantee by this section would be illusory if the remainderman, upon the theory of a forfeiture of the precedent estate by the conveyance by the owner thereof of the fee, was permitted to immediately enter upon the land. But under the common-law rule the heir was not bound to take advantage of a forfeiture, but might postpone his entry until the death of the tenant for life, and meanwhile the statute did not run against him. (*Jackson* v. *Mancius*, 2 Wend. 357; 2 Kent Com. 84.) The defense of the Statute of Limitations, therefore, was not made out. The life estate of the father terminated by his death in 1882, and the action was brought in 1887.

The defense in this action, if any exists, must rest either upon the doctrine of equitable estoppel, or upon the ground that the plaintiffs accepted the Rye property in satisfaction of, or in substitution for their interest in the lot on Hudson street. The doctrine that the owner of land may, by his acts, preclude himself from asserting his legal title against one who, in reliance thereon, has placed himself in a position where to allow the legal owner of the land to assert his legal right, would operate as a fraud upon the other party, is an established doctrine of courts of equity. The Statute of Frauds is not an obstacle to the exercise of this jurisdiction, and the reason usually assigned is that a court of equity will not permit a statute made for the prevention of frauds to be used as an instrument of fraud. The leading cases in this state of *Wendell* v. *Van Rensselaer* (1 Jo. Ch. 344) and *Storrs* v.

Barker (6 id. 166) illustrate the application of the principle. In the first case the grantee of land, holding a secret deed, studiously concealed its existence, and knowing that the grantor was dealing with the land as his own, conveying parts thereof to third persons, and that they were making valuable improvements in reliance on the validity of their titles, he meanwhile standing by and making no sign, was held to be estopped from setting up his deed against the subsequent grantees of the original owner. In the second case a father who, on the death of a married daughter, became by law vested by descent with the title to lands owned by the daughter, but which she, by her will, had undertaken to devise to her husband, was held to be precluded from asserting his title against the grantee of the husband, the father having encouraged the husband to sell and the grantee to buy, and having assured the purchaser that he had no title by inheritance by reason of the devise. The devise was in fact void by reason of the coverture of the wife, and although the father in advising the purchase acted in good faith, supposing at the time that the devise was legal, the chancellor applied the doctrine of estoppel on the ground that having encouraged the purchaser to buy, "equity and policy equally dictate that he and not the purchaser ought to suffer." In the one case there was notice that the grantor of the defendant was conveying the land, and fraudulent silence, and in the other active intervention and procurement, which, though innocent in intention, would be fraudulent in result if the party was permitted to set up a right inconsistent with the title of the husband under the devise. According to the general rule a fraudulent purpose or a fraudulent result lies at the basis of the doctrine of equitable estoppel. (Sto. Eq. § 1546.) A party is concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another and did so influence it, and where such denial will operate to the injury of the latter. (NELSON, J., *Welland Canal Co.* v. *Hathaway*, 8 Wend. 483.)

An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. The cases

of *Storrs* v. *Barker* (*supra*), and *Continental National Bank* v. *National Bank of Commonwealth* (50 N. Y. 576), were cases where there was no intent to mislead, but where what was said was intended to influence the action of the other party and did influence it, and a duty rested upon the party giving the information or making the statement, if he spoke at all, to have ascertained the actual facts so as not to have misled the other party to his prejudice. An estoppel may arise also from silence as well as words. But this is only where there is duty to speak, and the party upon whom the duty rests has an opportunity to speak, and knowing the circumstances requiring him to speak, keeps silent. (*Viele* v. *Judson*, 82 N. Y. 32; *Hamlin* v. *Sears*, Id. 327; *N. Y. Rubber Co.* v. *Rothery*, 107 id. 310.)

It is impossible, we think, to find in the facts of the present case the essential elements of an estoppel *in pais* against the plaintiffs, concluding them from asserting their title to the premises in controversy. In 1853, when the Glovers purchased the lot, the oldest child of Ambrose W. Thompson was seventeen years of age. The wrong perpetrated by the father in inducing the Glovers to purchase and pay for the land was consummated without the knowledge of the children, and when they were ignorant of their rights in the property. So, also, when in 1857 the Glovers built upon the lot, there is no pretext that the children knew of the sale to the Glovers, or that the Glovers were in possession or claimed the title, or that the building was being erected, nor indeed is there any evidence that the children then had any knowledge of the existence of the lot in question, or that any property had descended to them from their mother.

If the doctrine of estoppel can be invoked against the plaintiffs, it rests upon the fact that having subsequently ascertained that the Hudson street lot had descended to them from their mother, and that their father had wrongfully conveyed it, they neglected for many years to give notice of their claim to the Glovers or their grantees, and that meanwhile Smith, the grantee of the Glovers, had conveyed the lot to the present

defendants, who, in 1882, expended $3,000 in improvements on the premises, all these persons being ignorant of the fraud and supposing that the title under the deed to the Glovers was valid and undisputed. When the plaintiffs first knew that the Hudson street lot belonged to them is left in doubt. The declaration of trust recites that the mother at her death was seized in fee "of a certain house and lot on Hudson street," which on her death descended to her children. There is no evidence that the daughters ever saw this declaration of trust, or indeed knew of its existence prior to 1868, when they joined in the deed of the Rye property to Bonney, and the fact that they then knew its contents is a mere inference from that act. The declaration of trust, assuming that they then were informed of it, gave no information as to what particular property on Hudson street was owned by their mother, or that their father had conveyed it in fraud of their rights, or to whom the conveyance had been made. In 1872, one of the daughters seems to have then known that her step-mother had sold the property by passing herself off as the first wife. The daughters were not bound, at the peril of losing their land, to seek out and notify the Glovers and their grantees of their title. They had no present right to the possession of the property. The life estate of the father passed by his deed and did not terminate until 1882. It does not appear that the daughters had any information at any time prior to the father's death, as to whom he had conveyed the lot, nor of the subsequent deeds. They resided for many years away from New York, and never came in contact with the parties claiming title under the deed to the Glovers. They had no notice who was in possession of the lot, nor that the parties in possession contemplated making improvements thereon. In fact no improvements were made after they were apprised of their rights, except those made by Simpson in or about 1882. The building which constituted the principal addition in value to the lot, was erected by the Glovers in 1857.

We know of no authority which would justify the application of the doctrine of estoppel to bar the assertion of a legal

title to real property under circumstances such as are disclosed in this case. The owner of property which another has assumed to convey without authority, is not precluded by mere silence from subsequently claiming it. There must in addition have been both an occasion and a duty to speak, and it must appear that the omission to speak, upon opportunity being presented, was intentional or in negligent disregard of the plain dictates of conscience and justice. It is not necessary that the duty to speak should arise out of any agreement, or rest upon any legal obligation in the ordinary sense. Courts of equity apply to the case the principles of natural justice, and wherever these require disclosure they raise the duty and bind the conscience and base upon the omission an equitable forfeiture to the extent necessary to the protection of the innocent party. The mere fact that another may act to his prejudice, if the true state of things is not disclosed, does not render silence culpable, and mere inaction in such a case is not sufficient. (Bigelow on Estoppel, 595.)

The true owner owes no duty of active diligence to protect the other party from injury. There must be a standing by and encouragement, or at least an acquiescence, on the part of the true owner in acts inconsistent with his right, knowing that the other party, acting under a false impression, is about to do what will result in his injury. (See cases, *supra.*) The doctrine of estoppel *in pais* is inapplicable in this case for two reasons: *First*, the daughters had no knowledge of the facts until after the principal grievance and injury under the father's deed had been suffered, and after the facts came to their knowledge, they did nothing to influence the conduct of the purchasers, nor did they maintain a culpable silence such as authorizes a court of equity to base relief thereon, and *second*, for the reason that neither the Glovers nor any of their grantees have been misled or deceived by any act or word of the plaintiffs, nor have they relied upon any alleged "substitution of property," or upon any appearances or holding out by the plaintiffs inconsistent with the actual truth. The security of legal titles to real property and the uniform policy

of the law require that the doctrine of equitable estoppel, when invoked to bar the assertion of a legal title to land, should be cautiously applied, and only when the grounds for its application are clearly and satisfactorily established. (*Trenton Banking Co.* v. *Duncan*, 86 N. Y. 222.)

The remaining defense that the proceeds of the sale to the Glovers went into the purchase of the Murray Hill property and afterwards into the Rye property, and that the plaintiffs accepted the latter property in substitution for their interest in the Hudson street lot, is much more serious. These facts were found by the trial judge, and we are concluded by the findings if they are sustained by evidence. In the case of *Broomall* v. *McCallion* (6 Cent. Rep. 715), decided in Pennsylvania, several brothers and sisters in possession of land descended to them from their father, one of them bearing the same name as the father, personating him and passing off the property as his own, conveyed it without the knowledge of his co-heirs in exchange for other land, to a purchaser who was deceived by such identity in name, and the other heirs, on being informed of such exchange, removed with the brother to and took and remained in possession of the land conveyed to him in exchange, and it was held that by so doing and without giving notice of their title to the purchaser, they were estopped from setting up as against the purchaser want of title in their brother to the property conveyed by him. It was also held in *Goodman* v. *Winter* (64 Ala. 410), that where a tenant for life sells and conveys in fee in good faith, believing he has power to do so, and the remainderman accepts a portion of the purchase-money as compensation for his interest, or if the proceeds of the sale are invested by the tenant for life in other lands, taking the title to himself for life, with remainder as before, and the remainderman accepts such conveyance with full knowledge of the facts, in either case a court of equity will, at the instance of the purchaser, compel the remainderman to convey to him or bar the remainderman from asserting his legal estate in the lands so sold and conveyed.

Where one, without title or authority from the real owner,

assumes to sell and convey the land in fee and the true owner, knowing the facts, consents to and does accept the proceeds of the sale in full satisfaction of his interest, this ought in equity to operate as a confirmation of the unauthorized sale and preclude the real owner from asserting his legal title. The sale in the case supposed may be treated as his act, or at least it may operate in connection with the receipt of the purchase-money as an agreement on his part to sell to the purchaser and as a payment by the latter to the true owner of the consideration. The doubtful point in this defense in the present case arises from the weakness of the evidence tending to show that the proceeds of the sale of the Hudson street lot went into the Rye property, and also as to the other element, viz., that the children, knowing the facts, consented to accept the Rye property in substitution for their interest in the Hudson street lot. The transaction was, in its origin at least, clearly to the disadvantage of the children. The trust in the Rye property was created by the father without the consent or knowledge of the children, except the son Ambrose. It may be assumed that a court of equity, if it had been applied to in behalf of the infants for authority to exchange the Hudson street lot for the Rye property, subject to a mortgage of $15,000, which they had no means to pay, would not have authorized the exchange. The evidence of the acceptance by the daughters of the Rye property for the Hudson street lot, rests mainly upon the fact of their joining in the deed to Bonney and in the admissions proved to have been made by the daughter Mary, and the testimony of Mrs. Hewston that advances were made to the children by Stewart, which was the consideration of the deed to Bonney, his assignee.

The execution of the deed by the daughters was subject to explanation. If they joined in the deed at the request of the father, as a means of restoring to him the land, or to enable him to carry out the contract of sale to Stewart, made on a consideration passing between him and Stewart, then the act of the daughters would not seem to be inconsisient with a repudiation of the trust. The record title of the Rye property

was vested in the children by operation of the conveyance to Ambrose and the declaration of trust, and their conveyance would be necessary to make a good title of record. On the other hand, their act was consistent with the prior acceptance by them of the substituted provision. The matter is left unexplained by any evidence on the part of the plaintiffs. Neither Ambrose, the son, nor his surviving sister, was put on the stand to explain the circumstance. We have then (1) a conveyance by the children of the Rye property, in form a conveyance of the fee, for an expressed consideration of $60,000, acknowledged in the deed to have been received by the grantors; (2) the finding of the referee in his report on the distribution of the surplus arising on the foreclosure of the Dix mortgage, of the circumstances connected with the contract of sale to Stewart and the subsequent deed to Bonney; (3) some evidence, though slight, that the consideration of the Stewart contract was money advanced by him to the daughters on the credit of their interest in the Rye property, and finally we have the fact that no explanation was attempted to be given by the surviving children of the circumstances and motives which led to the execution of the deed, and further, a delay by the plaintiffs for five years after the death of their father before bringing their action Upon this state of the record we cannot say that there was no evidence upon which to base the finding that the children accepted the Rye property in lieu of their interest in the Hudson street lot, with knowledge of their rights, and if this was the fact, the defense was, we think, sustained.

If a new trial should be taken by the plaintiffs under the statute, and a different result on the facts should be reached, the question might then arise whether, under the peculiar circumstances, equity would not require that the purchasers should be indemnified out of the property for the enhanced value by reason of the improvements made by the defendant Simpson and his grantors. Upon this point we express no opinion. It may also be a question whether Ambrose Thompson does not stand in a situation different from his sisters in respect to claiming any interest in the Hudson street lot.

Statement of case.

The exception of the plaintiffs to the evidence given on the part of the defendants tending to show that the Glovers purchased in good faith, believing that they were acquiring a perfect title, was not well taken. It was proper to permit the defendants in aid of their equitable defense, to show the circumstances under which the Glovers purchased.

The judgment should be affirmed.

All concur.

Judgment affirmed.

128 295
167 438

LYDIA HULBERT et al., as Administrators, etc., Respondents, *v.* WILLIAM B. CLARK et al., Appellants.

The Statute of Limitations is merely a statutory bar to a recovery, and acts only upon the remedy; it does not after the prescribed period destroy, discharge or pay a debt or produce a presumption of payment, but simply stands in the way of the creditor seeking to compel payment.

A lien on property, personal or real, given as security for a debt, is not impaired by the fact that the remedy at law for the recovery of the debt is barred by the statute.

It seems the legislature may repeal the statute, and that a debt upon which the right of action was barred by the statute at the time of the repeal may thereafter be enforced by action without invading the constitutional rights of the debtor.

An action for the foreclosure of a mortgage given to secure the payment of certain promissory notes was brought within twenty years of the date of the mortgage but more than six years after the notes fell due. There was no covenant in the mortgage to pay the notes. *Held*, that the action was not barred by the Statute of Limitations; that the mortgage continued to be a subsisting lien, and could be foreclosed after an action at law upon the notes was barred by the statute.

Jackson v. *Sackett* (7 Wend. 94), distinguished and limited.

Borst v. *Corey* (15 N. Y. 505), distinguished and questioned.

Reported below, 57 Hun, 558.

(Submitted June 10, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1890, which modified, and affirmed as modified, a judgment in favor of plaintiffs, entered upon the report of a referee.

Statement of case.

This action was commenced in July, 1887, to foreclose a mortgage executed and delivered by the defendants to Reuben D. Hulbert, the plaintiffs' intestate, on the 8th day of March, 1867.

The mortgage, as stated therein, was given to secure the payment of eight promissory notes of $500 each held by Hulbert, all bearing the same date as the mortgage, and maturing at different times within nine months from their date. It was provided that the mortgage should become void if the notes, principal and interest should be paid at maturity, but that in case of default in the payment of the notes or any part thereof, it should be lawful for the mortgagee to sell the mortgaged premises in the manner prescribed by law, and out of the moneys received upon such sale to retain the amount then due and unpaid upon such notes, and to pay the balance, if any, to the mortgagor William B. Clark. There was no covenant to pay the notes or the mortgage. The answer alleged payment of the notes, a set-off and the six years' Statute of Limitations.

The action was referred and tried before the referee. He found that two of the notes had not been paid, and that there was due thereon over and above the set-offs allowed by him the sum of $1,310.09; and he decided that the mortgage was a subsisting security for that sum, and ordered judgment of foreclosure.

J. N. Hammond for appellants. An action cannot be maintained to foreclose a mortgage and thereby collect a debt when the debt itself could not be collected directly on account of its being barred by the Statute of Limitations. (*Aymar* v. *Bill*, 5 Johns. Ch. 70; *Jackson* v. *Willard*, 4 Johns. 41; *Ross* v. *Terry*, 63 N. Y. 613; *Kellogg* v. *Smith*, 26 id. 18; *Bergen* v. *Urbahn*, 83 id. 50; *Merritt* v. *Bartholick*, 36 id. 44.) Where law and equity have concurrent jurisdiction a claim barred at law is also barred in equity. (*In re Neilly*, 95 N. Y. 382; *Butler* v. *Johnson*, 111 id. 204; *Bonney* v. *Stoughton*, 122 Ill. 536; *Cortwright* v. *McGowan*, 121 id. 388; *Hendrickson* v. *Hendrickson*, 42 N. J. Eq. 657; *Hatch* v. *St. Joseph*, 68

Mich. 220; *Hollister* v. *York*, 59 Vt. 1; *Humphrey* v. *Carpenter*, 39 Minn. 115; *Godden* v. *Kimmell*, 99 U. S. 201; *Lewis* v. *Marshall*, 5 Pet. 470; *Coulson* v. *Walter*, 9 id. 62; 12 id. 32; 2 Wall. 87; 11 id. 96; 16 id. 190; *Jackson* v. *Sackett*, 7 Wend. 94; *Borst* v. *Cory*, 15 N. Y. 505; *Duty* v. *Graham*, 12 Tex. 427; *Goldfrank* v. *Young*, 64 id. 432; *Ebam* v. *Cannon*, 32 id. 231; *Bridges* v. *Blake*, 106 Ind. 332; *Kyger* v. *Riley*, 2 Neb. 20; *Peters* v. *Dunnelis*, 5 id. 460; *Hurley* v. *Estes*, 6 id. 386; *Henry* v. *C., etc., Co.*, 1 Nev. 619; *Chick* v. *Willetts*, 2 Kan. 385; *Schmuckers* v. *Sibert*, 18 id. 104; *Gower* v. *Winchester*, 33 Ia. 303; *Burton* v. *Hintrager*, 18 id. 348; *Sangster* v. *Love*, 11 id. 58; 4 id. 434; 38 id. 112; 19 id. 244; 37 id. 570; *Harris* v. *Mills*, 28 Ill. 44; *Hogan* v. *Parsons*, 67 id. 170; *Brown* v. *Devine*, 61 id. 260; *Pollock* v. *Matson*, 41 id. 517.) This note is presumptive evidence that a settlement was made at the date of it, of all demands between the parties, and a statement between them at that date of a balance due the payee to the maker, upon such settlement, of the amount of the note. (*Proctor* v. *Thompson*, 13 Abb. [N. C.] 340; *Lake* v. *Tyson*, 6 N. Y. 461; *Dutcher* v. *Porter*, 63 Barb. 15, 19.)

F. L. Manning for respondents.

EARL, J. The sole question for our determination is whether the mortgage continued to be a subsisting lien and could be foreclosed after an action at law upon the notes was barred by the Statute of Limitations. This is an interesting question which has given rise to considerable discussion in the courts of this country and England. We do not, however, deem it difficult of solution.

The Statute of Limitations does not after the prescribed period destroy, discharge or pay the debt, but it simply bars a remedy thereon. The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. The legislature could repeal the Statute of Limitations and then the pay-

ment of a debt upon which the right of action was barred at the time of the repeal, could be enforced by action, and the constitutional rights of the debtor are not invaded by such legislation. It was so held in *Campbell* v. *Holt* (115 U. S. 620). It was held in *Johnson* v. *Albany & Susquehanna R. R. Co.* (54 N. Y. 416), that the Statute of Limitations acts only upon the remedy; that it does not impair the obligation of a contract or pay a debt or produce a presumption of payment, but that it is merely a statutory bar to a recovery; and so it was held in *Quantock* v. *England* (5 Burr. 2628), and so it has ever since been held in the English courts.

These notes were, therefore, not paid, and so the referee found. The condition of the mortgage has, therefore, not been complied with. The notes being valid in their inception the only answer to the foreclosure of the mortgage is payment. The mortgage was given to secure payment of the notes, and until they are paid the mortgage is a subsisting security and can be foreclosed. The mortgage being under seal can be foreclosed by action at any time within twenty years. (Code, § 381.) It is only an action *upon* the notes that is barred after six years. (Code, § 382.)

It is a general rule recognized in this country and in England that when the security for a debt is a lien on property, personal or real, the lien is not impaired because the remedy at law for the recovery of the debt is barred.

The subject has several times been under consideration in the courts of this state. In *Jackson* v. *Sackett* (7 Wend. 94), ejectment was brought on a mortgage executed as collateral security for the payment of a sum of money secured to be paid by a note. The note had been past due more than twenty years when the action was commenced. Upon the trial it was the contention of defendant's counsel that from the lapse of time the note must be presumed to have been paid, and on that ground the court nonsuited the plaintiff. The Supreme Court upon review held that the evidence as to payment ought to have been submitted to the jury, and nothing else was decided. It was, in fact, held that payment of the note was

the only defense to the action, but the judge writing the opinion expressed what must now be conceded to be erroneous views as to the presumption of payment furnished by the Statute of Limitations. He appeared to be of opinion that after six years there was a statutory presumption of payment, not a presumption of law, but a presumption of fact from which, with other evidence, the jury might infer payment. In *Heyer* v. *Pruyn* (7 Paige, 465), the chancelor said that the intimation of an opinion by Justice SUTHERLAND in *Jackson* v. *Sackett*, "that a mortgage to secure a simple contract debt was presumed to be paid in six years because the Statute of Limitations might at the expiration of that time be pleaded to a suit on the note, certainly cannot be law." The case of *Pratt* v. *Huggins* (29 Barb. 277) is quite like this. That was an action to foreclose a mortgage given to secure the payment of $250, for which the mortgagee at the same time took the mortgagor's promissory note. The note and mortgage were dated February 5, 1835, and were payable February 1, 1836. The action was commenced September 6, 1855. Upon the trial the defendant claimed that the plaintiff could not maintain the action because an action upon the note was barred by the Statute of Limitations, and so the trial judge held and gave judgment for the defendant. The plaintiff appealed to the General Term, and there, after much discussion and consideration the judgment was reversed, the court holding that a debt secured by a sealed mortgage and an unsealed note may be enforced by a foreclosure of the mortgage after the expiration of six, but before the expiration of twenty years from the time when the debt became due; that the lapse of six years is not conclusive evidence that the mortgage has been paid, and that the provision of the Statute of Limitations making the lapse of six years a bar in such a case, is in terms confined to an action upon the note, and does not operate to defeat a remedy on the mortgage. There, as here, there was no covenant to pay in the mortgage, and the mortgage was collateral to the note. In *Mayor, etc.*, v. *Colgate* (12 N. Y. 140), it was held that the lien of an assessment which was to

be regarded in effect as a mortgage, could be enforced after the Statute of Limitations would have barred a common-law action against the person liable to pay the same for the recovery thereof. In *Morey* v. *Farmers' Loan and Trust Co.* (14 N. Y. 302), an action by the vendee for specific performance of a contract under seal to convey land, on payment of the purchase-money, it was held that the presumption arising from the lapse of twenty years after the money became due was not sufficient evidence of payment to entitle the plaintiff to the relief demanded. To the same effect is *Lawrence* v. *Bull* in the same volume at page 477. In *Borst* v. *Corey* (15 N. Y. 505), it was held that an action to enforce the equitable lien for the purchase-money of land, was barred by the lapse of six years after the debt accrued. The reasoning by which the result was reached in that case is not altogether satisfactory, and yet that decision is not in conflict with the views we now entertain. The judge there writing the opinion said: "The equitable lien (for the purchase-money) is neither created nor evidenced by deed, but arises by operation of law, and is of no higher nature than the debt which it secures." He distinguished that case from one like this as follows: "It has, however, been held that when a mortgage was given to secure the payment of a simple contract debt, the statute limiting the time for commencing actions for the recovery of such debt was no bar to an action to enforce the mortgage," and he cited among other cases *Heyer* v. *Pruyn*. He said further: "There is a material distinction between a mortgage and the equitable lien for the purchase-price of land given by law, and also between an action to foreclose a mortgage and one to enforce a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal the debt is not presumed to have been paid until the expiration of twenty years after it became due and payable." In *Johnson* v. *Albany & Susquehanna R. R. Co.* (*supra*), the action was to compel defendant to issue its certificate for stock subscribed for after an action to compel the subscriber to pay for

the stock had been defeated on the ground that the action was barred by the Statute of Limitations; and it was held that the plaintiff, notwithstanding the statutory bar, could recover only upon proof of actual payment. In *Lewis* v. *Hawkins* (23 Wall. 119), Mr. Justice SWAYNE, writing the opinion, recognizes the rule above stated as follows: "That the remedy upon the bond, note or simple contract for the purchase-money is barred in cases like this, in no wise affects the right to proceed in equity against the land." *Hardin* v. *Boyd* (118 U. S. 756) was a bill in equity to set aside a conveyance of lands, or in the alternative for the payment of the purchase-money, and to make it a lien on the lands; and it was held that, although the debt for unpaid purchase-money was barred by limitation under the local law, the lien therefor on the land was not barred. In *Coldcleugh* v. *Johnson* (34 Ark. 312), the Supreme Court said: "The debt itself would appear to be barred in 1872, and no action could be brought at law; but the bar of the debt does not necessarily preclude a mortgagee or vendee retaining the legal title from proceeding *in rem* in a court of equity to enforce his specific lien upon the land itself." The case of *Thayer* v. *Mann* (19 Pick. 535), is precisely in point. There in the case of a mortgage of real estate to secure the payment of a promissory note, it was held that although the note was barred by the Statute of Limitations, yet, because it had not been paid the mortgagee had his remedy upon the mortgage. In *Hancock* v. *Franklin Ins. Co.* (114 Mass. 155), there was a pledge of property to secure a note, and it was held that the pledgor might avail himself of the Statute of Limitations as a defense to a suit upon the note, but that the statute affected merely the remedy on the note, and did not defeat the lien of the pledgee upon the property pledged. In *Hannan* v. *Hannan* (123 Mass. 441), in an action to foreclose a mortgage given to secure a note, it was held that the question in such a case whether anything is due upon the note must be conducted in nearly the same way and depended mainly upon the same evidence as if the note were in suit, and that in such an action the defendant may show

the same matters in defense against the mortgage, except only the Statute of Limitations, that he could against the note. In *Shaw* v. *Silloway* (145 Mass. 503), it was said: "If there is an actual pledge and the debt becomes barred, this does not give to the debtor a right to reclaim the pledged property. The debt is not extinguished, the statute only takes away the remedy. In case of an ordinary mortgage of real or personal property, the security is not lost, though the debt be barred." In *Joy* v. *Adams* (26 Me. 330), it was held that the mortgagor could not defeat the right of the mortgagee to foreclose his mortgage by showing merely that the notes to which the mortgage security was collateral had become barred by the Statute of Limitations. In *Belknap* v. *Gleason* (11 Conn. 160), it was held that the Statutes of Limitations being statutes of repose, suspend the remedy, but do not cancel the debts; that though such statutes are equally available as a defense at law and in equity, yet where there are two securities for the same debt, one of which is barred by the statutes and the other not, the creditor, notwithstanding he has lost his remedy at law on the former, may pursue it in equity on the latter; and that where the security for a debt is a lien on property, personal or real, that lien is not impaired because the debt is barred by such statutes. In the case of *Ballou* v. *Taylor* (14 R. I. 277), it was held that the remedy on a mortgage is not lost because a personal action on the mortgage note is barred by the Statute of Limitations. In *Spears* v. *Hartly* (3 Espinasse, 81), Lord ELDON held that a wharfinger who had a lien on a log of mahogany could hold the log until his demand was satisfied, although the demand was barred by the Statute of Limitations; and *Higgins* v. *Scott* (2 Barn. & Ad. 413) is to the same effect.

We could go much further in these citations. But we have gone far enough to show that the rule applicable to a case like this is, both upon principle and abundant authority, as we have above stated it. There are cases in some of the states of this country which lay down a different rule. But those cases generally depend upon some local statutes, or are to be found in states where it is held that the Statute of Limitations not

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only bars the remedy but destroys and annihilates the debt by the presumption that it has been paid or discharged.

There are no other questions which need examination.

Our conclusion, therefore, is that the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Samuel McElroy, Appellant, *v.* Henry Mumford et al., Respondents.

The rule which restricts the liability of sureties to the strict terms of their contract and forbids an extension thereof by inference or implication, does not apply to a case where the instrument shows a clear intention, on the part of the sureties, to come under a more enlarged obligation.

An undertaking on appeal may be in any form which expresses the intent of the parties with sufficient clearness to enable the court to understand its meaning.

It is not the office of the undertaking to show the nature and scope of the appeal, and the only object of describing the judgment therein is to enable it to be identified as the subject of the instrument, and when this is accomplished its office is performed.

Under the provision of the Code of Civil Procedure (§ 1332), that in case of an appeal to the Court of Appeals from a judgment or order of affirmance, "the undertaking must be the same as if the judgment or order from which the appeal is taken was to the same effect as the judgment or order so affirmed," an order of affirmance must be treated as though it had directed the payment of the same sum as that provided for by the original judgment, and an undertaking given on appeal from a judgment of affirmance has the same effect as if the judgment had expressly directed the payment of the sum included in the original judgment.

An undertaking given upon an appeal to this court from a judgment of the General Term, after describing the judgment as one recovered by the respondent against the appellant on December 12, 1887, for "$122.97, being costs of affirmance," and after stating the court and county in which it was entered, was to the effect that in case of affirmance the appellant would pay the sum directed to be paid by the judgment appealed from, or the part thereof affirmed. The notice of appeal served therewith described the appeal as from an order affirming a judgment entered June 30, 1887, for $3,659.08, and from a judgment entered December 12, 1887, "for $122.97, costs upon said affirmance." The order for judgment entered at General Term recited the affirmance, on December 12, 1887, of the judgment entered June 30, 1887,

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with costs and disbursements; that the costs had been taxed at $122.97. In an action upon the undertaking, the sureties claimed that, as the undertaking referred to the judgment of General Term as one for costs alone, it should not be held to cover the original judgment which was affirmed, and so, that they were only liable for so much of said judgment as awarded costs. *Held*, untenable; that the evident intent was to appeal from and to secure a stay on the entire judgment of the General Term (Code Civ. Pro. 1326, 1327, 1334), and this the language of the undertaking sufficiently indicated, and so, it must be held to be applicable to the entire judgment, not simply to the costs, a mere incident thereof, and as the effect of such judgment was to authorize the plaintiffs to proceed and collect the original judgment, the sureties were liable for its payment.

Morse v. *Hasbrouck* (10 Abb. [N. C.] 407), disapproved.

McElroy v. *Mumford* (59 Hun, 173), reversed.

(Argued June 12, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1891, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term and directed a new trial.

This was an action upon an undertaking on appeal, of which the following is a copy:

"N. Y. SUPREME COURT — KINGS COUNTY.

"SAMUEL MCELROY, Respondent, *against* THE BROOKLYN UNDERGROUND RAILROAD COMPANY, Appellant.

"Undertaking on appeal from a judgment directing the payment of money.

"WHEREAS, on the twelfth day of December, 1887, in the New York Supreme Court, county of Kings, Samuel McElroy, the above-named respondent, recovered a judgment against The Brooklyn Underground Railroad Company, the appellant, for the sum of $122.97, being costs of affirmance, and with interest thereon from that date.

"And the said appellant, feeling aggrieved thereby, intends to appeal therefrom to the Court of Appeals.

"Now, therefore, we, Henry Mumford, residing at No. 218 Quincy street in the city of Brooklyn, and John French, resid-

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ing at No. 469 Clinton avenue in Brooklyn city, do hereby, pursuant to the statute in such case made and provided, jointly and severally undertake that the appellant will pay all costs and damages which may be awarded against it on said appeal not exceeding five hundred dollars, and do also undertake that if the said judgment so appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the sum recovered or directed to be paid by the judgment, or the part thereof as to which judgment affirmed.

"Dated *December* 21*st*, 1889.

"JOHN FRENCH,
"HENRY MUMFORD."

The material facts are stated in the opinion.

T. C. Cronin for appellant. The undertaking provided for the payment of the balance of the judgment appealed from and unpaid under the notice of appeal, that is, all of the judgments below, and is in strict conformity to the Code. (Code Civ. Pro. § 1351; *Morss* v. *Hasbrouck*, 15 Wkly. Dig. 308; 13 Abb. [N. C.] 481.) The sureties are liable on the undertaking, when the notice of the appeal covers the judgments and orders in the court below as the judgment so "appealed from or any part thereof," and the stay was acted on, as secured by the undertaking, as in this case. (*Goodwin* v. *Bunzl*, 102 N. Y. 224; *Deossy* v. *Morgan*, 74 id. 11; *Lowe* v. *Burdett*, 32 Hun, 588; *Hill* v. *Burke*, 62 N. Y. 111; *Hemingway* v. *Poucher*, 98 id. 281; *C. S. & A. Assn.* v. *Read*, 124 id. 189.)

Leslie W. Russell and *Welton Percy* for respondents. The undertaking in suit did not purport to bind the sureties to pay the original judgment. It was good as the jurisdictional undertaking required on appeal to this court, and bound the sureties to pay the $122.97 judgment at General Term, and the costs in this court. It recited nothing more. (Code Civ. Pro. §§ 993, 1317, 1326, 1332; *Morss* v. *Hasbrouck*, 10 Abb. [N. C.] 407; *Hinckly* v. *Krutz*, 58 N. Y. 583; *Briggs* v. *Brown*, 13 Abb. [N. C.] 481; *Hill* v. *Burke*, 62 N. Y. 111; *Post* v. *Doremous*, 60 id. 371.)

Opinion of the Court, per Ruger, Ch. J.

Ruger, Ch. J. It is not claimed that the undertaking given on an appeal to this court and sued upon, was insufficient in form to stay an execution on the original judgment, except for the alleged fact that such judgment was not fully described in the recitals of the instrument. The undertaking describes the judgment of the General Term as one that was recovered by the respondent against the appellants in the New York Supreme Court, county of Kings, on the 12th day of December, 1887, "for the sum of $122.97, being costs of *affirmance* and with interest thereon from that date." If this recital had referred to the judgment as being one of affirmance, with costs, no question could have been raised as to the sufficiency of the undertaking to secure a stay of execution upon the original judgment. The notice of appeal to this court, which was served simultaneously with the delivery of the undertaking, described the appeal as taken "from an order made and entered herein on the 12th day of December, 1887, affirming a judgment entered herein on the 30th day of June, 1887, for $3,659.08, and from the judgment entered herein on the 12th day of December, 1887, for the sum of $122.97, costs upon said affirmance." The order for judgment entered at General Term was in these words: "The judgment entered on the report of the referee herein 30th June, 1887, for $3,659.08, having been affirmed by the General Term of this court on the 12th day of December, 1887, with costs and disbursements, and the same having been taxed at the sum of $122.97, it is ordered * * * that the same be and hereby is entered as a judgment against said defendant and appellant."

It thus appears that the appeal actually taken was from the whole judgment, and not from a part thereof, and that the judgment itself was entire and indivisible.

It is contended by the defendants that, because the undertaking refers to the judgment of the General Term as one for costs alone, it should not be held to cover the original judgment which was affirmed by the order of the General Term, but should be limited to so much of such judgment as awarded costs. It is claimed that the rule which restricts the lia-

bility of sureties to the strict terms of their contract, and forbids an extension thereof by inference or implication, requires such a construction of the undertaking. We concede the full force of the rule referred to, but are of the opinion that it does not apply to a case where the instrument shows a clear intention to come under a more enlarged obligation.

We think that such an intention is found in the terms of this undertaking.

A cogent illustration of the rule referred to is found in the case of *Goodwin et al.* v. *Bunzl et al.* (102 N. Y. 224). In that case the defendants had executed an undertaking on an appeal to the General Term from a judgment for the recovery of a chattel. The undertaking actually given was in the form prescribed by the Code to stay execution on money judgments alone. It was held, in accordance with what was assumed to have been the intention of the parties, that the undertaking was a valid security for the stay of proceedings on the appeal, as otherwise it would have been an idle ceremony to execute it.

We think the intention here was equally clear, from the whole instrument, that the parties intended to secure a stay on the entire judgment rendered by the General Term. It was unnecessary in this case for the appellants, in order to perfect the appeal to this court, to give any other undertaking than one to pay all costs and expenses awarded on the appeal, not exceeding five hundred dollars. (§ 1326, Code of Civil Procedure.) But to stay an execution, it was necessary to give a further undertaking to the effect "that if the judgment or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, he (the appellant) will pay the sum recovered or directed to be paid by the judgment or order, or the part thereof as to which it is affirmed." (§ 1327.) It was at the option of the appellant to give the first or both of these undertakings and to unite them in one instrument or not, as he should elect. (§ 1334.) The defendant here gave both undertakings and combined them in one instrument.

This indicated an unmistakable intention to procure a stay

of execution on some judgment already entered. Is it credible to suppose that it was intended to procure a stay for the insignificant sum of the costs alone and leave itself exposed to the hazard and inconvenience of being forced to pay the larger sum of nearly four thousand dollars?

The same reason which would induce to stay proceedings on the smaller amount would operate still more forcibly for any larger sum. It would be a very restricted construction which would limit the protection of this undertaking to the smaller amount alone.

We also think this construction is in harmony with the language used in the undertaking. That states the date of the judgment entered, the court and county in which it was entered and refers to an affirmance of some prior judgment between the same parties by the General Term. It seems to us that this is all that is required to form a good undertaking for the entire judgment, unless some indication is found in the instrument, or the notice of appeal of an intention to appeal from a part of the judgment only. We find no such indication. It is not the office of the undertaking to show the nature and scope of the appeal, for that is performed by the notice of appeal. The only object of describing the judgment in the undertaking is to enable it to be identified as the subject of the instrument, and when this is accomplished its office has been performed.

This was effected by referring to it as a judgment of a certain date, between certain parties, or as an affirmance of a judgment between the same parties, with costs. The award of costs by the General Term was an incident merely of the affirmance and could have had no legal existence separate from such affirmance.

There was, in fact, but one judgment in the General Term of the date and between the parties described and but one actually appealed from or referred to in the undertaking, and to hold that the judgment referred to included the costs only would violate the intention of the parties and enable the defendants to take advantage of an assumed ambiguity created by their own act.

Suppose the character of the judgment was not described in the undertaking with exact particularity, so long as there was enough in the description to identify it with certainty, can it be held that the undertaking is, for that reason, void or inef fective? The undertaking described a judgment in the Supreme Court in favor of the respondents and against the appellant, entered on the 12th day of December, 1887, in Kings county "for the sum of $122.97, being costs of affirmance," and says, "the said appellant feeling aggrieved thereby intends to appeal therefrom to the Court of Appeals." Is it not the judgment entered on the twelfth of December that the appellant intends to appeal from? It seems absurd to say that they intended to appeal from the mere incident of that judgment. No such intention is indicated in the undertaking, but the inference seems clear that the intent was to appeal from the whole judgment. The parties acted upon this understanding and no execution was issued, or attempt made to collect the judgment. It is evident that that was also the understanding of the parties when they served their notice of appeal, for that instrument fully describes an appeal from an order affirming the original judgment, and when the parties say in their undertaking that they "do also undertake that if the *said judgment so appealed from* or *any part thereof* is affirmed, or the appeal is dismissed the appellant will pay the sum recovered or directed to be paid by the judgment of (or) the part thereof as to which judgment is affirmed," they had in view such judgment as was fully described in the notice of appeal, as well as that which was also described, though somewhat briefly, in the recitals of the undertaking. The whole judgment having been appealed from and affirmed how can the sureties perform their undertaking that the appellant shall pay so much of the judgment *appealed from as may be affirmed*, unless they be held liable for the amount required to be paid by the judgment of the General Term, which included the original judgment as well as costs of appeal? The effect of the judgment of the General Term was to authorize the plaintiffs to proceed and collect the original judgment and was,

in effect, a judgment directing the payment of the sum due thereon to the plaintiffs.

Such we understand to be the effect of the decision in *Hinckley* v. *Kreitz et al.* (58 N. Y. 583). Judge Church there says: "When the judgment was affirmed at General Term the liability of the defendants (the sureties in the first undertaking) was fixed. The defendant, their principal, had a right of appeal to the Court of Appeals; but to do so it was, in the first place, indispensable to furnish sureties to an undertaking for $500 to secure costs and to stay proceedings to an undertaking to pay the judgment if affirmed." It was accordingly held in that case that the liability of the sureties on appeal to this court was for the payment of the original judgment, as included in and covered by the judgment of affirmance, and relieved the sureties on the appeal to the General Term from their primary liability.

As stated by the codifiers, section 1332 was framed to make the principle of this decision a part of the statutory law. That section reads as follows: "When the judgment or order, from which an appeal is taken to the Court of Appeals, affirms a judgment or order to the effect specified in either of the last five sections, the undertaking must be the same as if the judgment or order, from which the appeal is taken, was to the same effect as the judgment or order so affirmed." In other words, if the judgment affirmed required the payment of money the order of affirmance must be treated as though it had directed the payment of the same sum as that provided for by the original judgment, and an undertaking given on appeal from a judgment of affirmance will have the same effect as though the judgment of affirmance had expressly directed the payment of the sum included in the original judgment. The meaning of this section is not plain, but it nowhere purports to prescribe the form of an undertaking and this was, of course unnecessary, as it may be in any form which expresses the intent of the parties with sufficient clearness to enable the court to understand its meaning. There was room for question, under the previous sections, whether a mere judgment of

affirmance was a judgment for the recovery of money, when the original judgment was not expressly re-adjudged in the order of affirmance, and the section seems to have been intended to clear up this question.

By section 1317 the General Term were prohibited from expressly awarding the payment of a sum of money in affirming a judgment, and this left it in some doubt as to whether a judgment of affirmance was a judgment for a sum of money, within the meaning of section 1327, which could be secured by an undertaking on appeal from the General Term, but this section, in substance, provides that a judgment of affirmance shall be treated in the undertaking as a judgment for the recovery of money; otherwise there is no way provided by the Code for staying execution on such a judgment during the appeal to the Court of Appeals.

The form of an undertaking to stay an execution on appeal from a judgment for a sum of money is given by section 1327, and section 1332 was unnecessary and inadequate to effect any change of this form and it, therefore, says substantially that the undertaking given on an appeal from a judgment of affirmance shall be the same as though that judgment was to the same effect as the original judgment or, in other words, the same as upon a judgment for money.

As thus construed it is intelligible and accomplishes the object which the codifiers state was the purpose of the section. If interpreted as a direction for the form of an undertaking, it utterly fails to convey any idea and throws no more light upon the form of the instrument than would any other jumble of words. We, therefore, disapprove of the construction given to such an undertaking in *Morss* v. *Hasbrouck* (10 Abb. [N. C.] 467).

The order of the General Term should be reversed and the judgment rendered at Circuit affirmed, with costs to plaintiff in all courts.

All concur.

Order reversed and judgment affirmed.

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GEORGE C. CARTER, Respondent, *v.* EMILY P. BECKWITH et al., as Administrators, etc., Appellants.

One who has been judicially determined to be a lunatic and for whom a committee has been appointed is incapable of entering into a contract, and any contract he assumes to make is absolutely void.

The presumption of the continuance of the lunacy is conclusive as to all dealings with the lunatic after the inquisition and until it has been superseded.

The court has power, on an application to supersede the commission, where reasonable grounds appear, to inquire whether the lunacy still continues, and even in a doubtful case to direct the inquiry; it may also, in its discretion, make the reasonable costs and expenses a charge upon the lunatic's estate, and this, although the traverse prove unsuccessful.

It seems, that during the existence of the commission, the jurisdiction to award costs and expenses may only be invoked on petition or motion.

As, however, upon the death of the lunatic the power of the committee *ipso facto* terminates and his real and personal property passes in the same manner as if he had been of sound mind and memory, the jurisdiction of the court to summarily administer his estate then ceases and all claims against the estate, including claims for such costs and expenses, must be adjusted and settled in the ordinary course of administration.

Plaintiff, an attorney, upon the request of B., defendants' intestate, who had been adjudged a lunatic and for whom a committee had been appointed, instituted a proceeding to supersede the commission, and to have restored to him possession and control of his property. The court, after a full hearing, ordered a reference to inquire as to the continued insanity of the petitioner; the proceedings resulted in a determination that the lunacy still continued. After the death of B., plaintiff presented to the administrators a claim for his services, and upon rejection thereof brought this action to recover the same. *Held*, that it appearing and having been found that plaintiff instituted the proceedings in good faith and that there was probable cause, the action was maintainable.

During the life-time of B. plaintiff instituted proceedings by petition for an allowance. The matter was referred and the report of the referee in plaintiff's favor was confirmed by the Special Term, and an order made directing B.'s committee to pay plaintiff out of the lunatic's estate the sum awarded. An appeal was taken to the General Term, which was argued before the death of B., but was not decided until afterwards. The General Term reversed the order appealed from and vacated the reference, but did not deny the original application; the order of reversal was entered as of a date anterior to B.'s death. *Held*, that the question as to plaintiff's right to compensation was not rendered *res adjudicata* by the decision of the General Term, as that decis-

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ion may have proceeded on grounds entirely consistent with plaintiff's claim to some compensation.

The General Term directed a reduction of the judgment and an affirmance for the reduced amount, if plaintiff consented to the reduction, which he did. *Held*, that of this defendants could not complain.

(Argued June 19, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 1, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Lansing for appellant. The alleged contract by which the plaintiff was retained by the defendant's intestate having been made subsequently to the intestate having been judicially declared a lunatic and the appointment of a committee of his person and estate, was absolutely void. (*Fitzhugh* v. *Wilcox*, 12 Barb. 235–237; *Wadsworth* v. *Sherman*, 14 id. 169; 8 N. Y. 388; *In re Beckwith*, 3 Hun, 443–445; *Lewis* v. *Jones*, 50 Barb. 645–649; *L'Amoreaux* v. *Crosby*, 2 Paige, 422–427; *In re Burr*, 5 Barb. Ch. 208; *Hughes* v. *Jones*, 116 N. Y. 67–73.) After inquisition found, the care and custody of the lunatic's estate was vested in the Supreme Court by which the defendant's intestate was declared a lunatic, and whether any and if any and what costs and disbursements should be allowed the plaintiff, assuming to act for the lunatic, upon an unsuccessful attempt to take the lunatic and his property from the care and custody of the court, presented a question to be determined by the court in its discretion, upon the application of the claimant or otherwise. (*In re Folger*, 4 Johns. Ch. 169; *In re McLean*, 6 id. 440; *In re Tracy*, 1 Paige, 580–583; *In re Van Cott*, Id. 489; *In re Conklin*, 8 id. 450; *In re Beckwith*, 3 Hun, 443–448; 87 N. Y. 503–507; *In re Otis*, 101 id. 580–583.) The order entered is conclusive upon the plaintiff in this action. It is *res adjudicata* that the plaintiff is not entitled to anything for his

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services and disbursements on the application he made to supersede the commission. (*Demorest* v. *Dorg*, 32 N. Y. 281, 290; *Embury* v. *Connor*, 3 id. 511–522; *Doty* v. *Brown*, 4 id. 71–73; *Castle* v. *Noyes*, 14 id. 329, 331; *White* v. *Coatsworth*, 6 id. 137, 139; *Ethredge* v. *Osborn*, 12 Wend. 399, 402; *Supervisors, etc.*, v. *Briggs*, 2 Den. 26, 33; *In re Beckwith*, 3 Hun, 443; 87 N. Y. 503; 90 id. 667; *Carter* v. *Beckwith*, 82 id. 83.) If the plaintiff was entitled to recover in this action the amount of the recovery would not be more than the amount which would be taxed in a suit, and such disbursements as would be taxable to a successful party in an action. (*In re Conklin*, 8 Paige, 450.) The proceedings were not for the benefit of the lunatic or his estate. (*In re Tracy*, 1 Paige, 580; *In re Beckwith*, 87 N. Y. 507; *H. Ins. Co.* v. *Tomlinson*, 58 id. 215, 216; *Fleischmann* v. *Bennett*, 79 id. 579–582; *F. L. & T. Co.* v. *B., etc., T. Co.* 109 id. 342, 344; *Gorham* v. *Innis*, 115 id. 87–93.) The facts in the paper headed request to find under section 1023 of the Code, cannot be considered. (*Nobis* v. *Pollock*, 17 Civ. Pro. Rep. 243; *Graff* v. *Ross*, 47 Hun, 152; *Harris* v. *Van Wert*, 96 N. Y. 642.) The General Term had no right to modify the judgment by reducing the amount of the recovery as was done in this case. (*Cassin* v. *Delany*, 38 N. Y. 178–181; *Whitehead* v. *Kennedy*, 69 id. 462–468; *Holmes* v. *Jones*, 121 id. 461–467.)

P. C. J. DeAngelis for respondent. Upon the death of Mr. Beckwith the power of his committee ceased, and his property was to be administered and disposed of as if the committee had not been appointed. (Laws of 1865, chap. 724; Code Civ. Pro. § 2344; *In re Beckwith*, 87 N. Y. 503, 508.) The proceedings in which the application of plaintiff for costs, etc., was made, abated. (87 N. Y. 508.) A lunatic after the appointment of a committee, may employ (as far as he can be said to exercise volition on the subject) an attorney to aid him in proceedings to supersede the commission of lunacy, and, although the proceedings fail, and the lunatic dies, his estate

is liable for the value of the services and disbursements of the attorney, subject to this: if anything fraudulent or unfair, or frivolous or litigious appear to have taken place on the part of the attorney, the court may say that no debt arises. (*Wentworth* v. *Tubb*, 2 Y. & C. [21 Eng. Ch.] 537; *Brockwell* v. *Bullock*, L. R. [22 Q. B. Div.] 567; *Rhodes* v. *Rhodes*, L. R. [44 Ch. Div.] 94; *In re Beckwith*, 3 Hun, 443, 446; *In re Otis*, 101 N. Y. 580; *Pharis* v. *Gere*, 110 id. 336; *Wadsworth* v. *Sharpsteen*, 8 id. 388, 392; *Lewis* v. *Jones*, 50 Barb. 645; *Barnes* v. *Hathaway*, 66 id. 452, 456, 457; *Ingraham* v. *Baldwin*, 9 N. Y. 45, 48.) The court having the custody, care and control of the lunatic's estate, has the right, in its discretion, to give the attorney for the lunatic costs payable out of the estate upon an unsuccessful attempt to supersede the commission. (*In re Tracy*, 1 Paige, 582; *In re McLean*, 6 Johns. Ch. 440.) The doctrine of *stare decisis* has no application. (*Ernst* v. *H. R. R. R. Co.*, 35 N. Y. 42.) There is no former adjudication in bar. (Code Civ. Pro. § 1317; Code Pro. § 330; *Riggs* v. *Pursell*, 74 N. Y. 370; *S. S. Bank* v. *S. C. & N. Y. R. R. Co.*, 88 id. 116; *In re Moore*, 67 id. 555.) The Statute of Limitations is not a defense in this action. (Code Civ. Pro. §§ 382, 403.) The claim was not barred by the Statute of Limitations of rejected claims. (Code Civ. Pro. § 1822.)

ANDREWS, J. The judgment recovered in this action is founded upon a claim for services rendered by the plaintiff, an attorney, upon the request of the intestate, in the prosecution of proceedings in the Supreme Court, instituted in 1871, to supersede a commission of lunacy issued against the intestate in 1855, and to have restored to him the possession and control of his property. The proceedings failed in their object, it having been determined that the lunacy still continued. The lunatic died in 1875, and the plaintiff presented to his administrators a claim for his services, which claim was rejected by them, whereupon this action was brought.

The main question in the case is whether, under the circumstances, a liability was created in favor of the plaintiff for the

value of the plaintiff's services, enforceable in an action against the estate of the deceased lunatic. It is clear, under the decisions, that the plaintiff cannot maintain the action on the theory of a contract with the lunatic to pay for the services arising out of an employment by the lunatic. The law is well settled that a lunatic whose lunacy has been judicially determined and for whom a committee had been appointed, is incapable of entering into any contract, and that any contract which he may assume to make while in that situation, is absolutely void. (*Wadsworth* v. *Sharpsteen*, 8 N. Y. 388; *L'Amoreaux* v. *Crosby*, 2 Paige, 422; *Hughes* v. *Jones*, 116 N. Y. 67.)

The court will not inquire whether the lunacy in fact continued and existed when the contract was made. The presumption of its continuance is conclusive as to all dealings after the inquisition until it has been superseded. The court on the finding of an inquisition establishing lunacy, is vested with jurisdiction over the person of the lunatic and assumes the custody and control of his estate, which it manages through the committee appointed in the proceedings, as its bailiff or agent, and although the title of the lunatic to his property is not divested by the proceedings, he can no longer buy or sell, or enter into any contract or dealing binding him or his estate. (*People ex rel. Smith* v. *Commissioners, etc.*, 100 N. Y. 215; *In re Otis*, 101 id. 580.) The incapacity of a lunatic whose lunacy has been judicially ascertained in lunacy proceedings to bind himself, does not relieve his estate from debts or liabilities incurred anterior to the lunacy. But he cannot be sued without permission of the court, except at the peril of the party prosecuting, of having his action restrained and of being adjudged in contempt. (*In re Heller*, 3 Paige, 199; *In re Hopper*, 5 id. 489. See also *Crippen* v. *Culver*, 13 Barb. 424.) The court as incident to its jurisdiction in lunacy, administers the estate of an adjudged lunatic for the protection of creditors, and will apply it to the payment of his debts, the expenses of support and maintenance of the lunatic and his family, and the satisfaction of all obligations, charges and

expenses which legally or equitably ought to be satisfied out of his property.

The question as to the allowance of costs in lunacy proceedings has been several times before our courts. It has been the usual practice to allow to the petitioner for a commission, the costs and expenses of proceedings in lunacy out of the estate of the lunatic, where they have resulted in the appointment of a committee. Rule 85 of the Supreme Court, authorizes the committee to pay such costs and expenses without the order of the court, where they do not exceed $50, but if they exceed that sum, payment cannot be made without the special order of the court. It was said by the chancellor in the case *In re Giles* (11 Paige, 638), that if the petitioner fails to establish the lunacy, he must bear his own costs, but that he will not be charged with costs if he proceeded in good faith and upon probable cause. To the same effect on the last point is the remark of Chancellor KENT in *Brower* v. *Fisher* (4 Jo. Ch. 441). The English rule seems to be less stringent, and costs will be allowed to the petitioner, although the alleged lunatic be found by the inquisition to be of sound mind. (*Nelson* v. *Duncombe*, 9 Beav. 211.) It was held in *Matter of Conklin* (8 Paige, 450), that a solicitor who unsuccessfully opposes a commission of lunacy, has no legal claim on ground of contract for his services, but that the court may in its discretion allow the solicitor his taxable costs out of the lunatic's estate, where the circumstances are such that the chancellor, if applied to, would have sustained or directed the opposition; and a small allowance was made in that case.

The question here relates to the right of an attorney to recover compensation out of the estate of a lunatic for services rendered in an unsuccessful attempt to procure a supersedeas of a commission, and where the inquiry was expressly sanctioned by the court. The statute provides that in case any lunatic, against whom an inquisition has been found, shall be restored to his right mind and become capable of conducting his affairs, his real and personal estate shall be restored to him. (2 Rev. St. 55, § 24.) The statute is simply declaratory of the

common law. Upon the application of a lunatic to set aside the commission, the court may, in its discretion, deny the application, and will do so where the case is plain, or it may allow the lunatic to traverse the inquisition, or order a feigned issue to try the question of his present sanity. (*In re M'Clean*, 6 Jo. Ch. 440; *In re Tracy*, 1 Paige, 580.) In the case first cited the court at first denied the application, but subsequently, on the application being renewed, directed a feigned issue. The question whether an allowance should be made to the person prosecuting the traverse, out of the estate of the lunatic, or whether he should be charged with costs in case of an unsuccessful traverse, has been variously ruled, depending upon the special circumstances of the particular case. In the *Matter of Tracy* (*supra*), the case of an habitual drunkard, upon an application made in his behalf, to be permitted to traverse the inquisition, and that a reasonable amount for the expenses of the traverse might be paid out of his estate, an issue was granted, and "as the property was large and the party had not had an opportunity to be heard on the taking of the inquisition," an allowance was made out of the estate of the petitioner to defray the necessary expenses on his part. In *Folger's Case* (4 Jo. Ch. 169), the costs of an unsuccessful traverse was charged upon a third party, at whose instance and for whose benefit the issue was awarded. In the *Matter of Van Cott* (1 Paige, 489), the application of a solicitor for an habitual drunkard, who had procured leave to traverse the inquisition, for an allowance of costs of an unsuccessful traverse out of the estate of the party against whom the inquisition was found, was denied for the reason that the solicitor had a personal interest to set aside the proceedings. But the court, in denying the application, affirmed the doctrine that the allowance in such a case was discretionary, saying, "It depends on the character of the application and the conduct of the party." In *Matter of M'Clean* (*supra*), the chancellor permitted the lunatic to traverse the inquisition, but decided that it should not be done at the expense of the estate. The estate was small and necessary for the support of the lunatic

and his family, and the application appeared to the chancellor to be groundless.

The cases show, we think, that no hard and fast rule has been established in this state, concerning allowance to the defeated party or his attorney, of the costs and expenses of an unsuccessful traverse of an inquisition of lunacy. Where the proceeding is clearly groundless, or vexatious, and is supported by no probable cause, or is instituted in bad faith, or for the benefit of a third party, clearly no costs should be allowed. But as this exercise of the jurisdiction of the court to deprive a person of his liberty and property on the ground of lunacy, however necessary, is, nevertheless, the exercise of a supreme power, and should be surrounded by all reasonable safeguards to prevent mistake or fraud, so, also, where upon a case presented after inquisition, there is reasonable ground to inquire whether the lunacy still continues, it is highly important for the protection of the rights of the party that he should be afforded all reasonable facilities for the prosecution of the inquiry, and it cannot, we think, be doubted that the court has the power on an application to supersede the commission, where it is convinced that there is probable cause, or even, in a doubtful case, to make the reasonable costs and expenses of the traverse a charge upon the lunatic's estate, and this although the traverse prove unsuccessful. Unless this power exists, the direction of the statute that on the restoration of reason and the capacity of the lunatic to conduct his affairs, his real and personal estate shall be restored to him, would, in some cases, afford but a barren protection. The language of the chancellor in 1 Paige, 582, commends itself for its wisdom and equity. "In every case of this kind," he remarks, "the court must exercise a sound discretion, regulated by the particular circumstances, so that while the party proceeded against is not deprived of the means of protecting his legal rights, the property which is necessary for the support of himself and family shall not be unnecessarily wasted in fruitless litigation."

The further question arises, as to the nature of the claim

and as to the means of enforcing it in the case of an unsuccessful traverse, but where the circumstances equitably entitle the expenses of the traverse to be charged upon the lunatic's estate. There can be no doubt we think that during the pendency of the commission the question whether the costs of an unsuccessful traverse shall be allowed out of the estate of a lunatic, is one exclusively within the cognizance of the court having jurisdiction of the lunatic and his estate, and that its jurisdiction to award costs and expenses can only be invoked on petition or motion. This results from the settled practice in such cases, the fact that the court has custody of the person and estate of the lunatic, and as incident to its control the power to administer the estate for the purpose of satisfying all just and equitable charges thereon, created either before or after the finding of the inquisition and the policy of preventing unnecessary litigation, whereby the estate may be wasted. It is a summary, convenient and inexpensive method of determining the right in each particular case. But on the death of a lunatic who is under a commission, the power of the committee *ipso facto* terminates and his real and personal property, if he dies intestate, descends to his heirs and personal representatives in the same manner as if he had been of sound mind and memory. (2 Rev. St. 55, § 24.) There is no longer any necessity that the court should exercise a summary jurisdiction in administering the lunatic's estate for the payment of debts or charges, and there seems to be no good reason why any claim thereon, legal or equitable, should not thereafter be adjusted and settled in the ordinary course of administration, as in other cases.

In the present case the plaintiff, during the life of the lunatic, applied to the court by petition for an allowance out of his estate for his services in the proceedings to supersede the commission. The court ordered a reference and the referee reported that a certain sum ought to be allowed. The report was confirmed by the Special Term, and by its order the committee was directed to pay to the petitioner out of the lunatic's estate the sum awarded. The General Term, on the appeal of

the committee, reversed the order of confirmation and vacated the order of reference. The appeal to the General Term was argued and submitted before the death of the lunatic, but the decision was not rendered until after his death, but the order of reversal was entered as of a date anterior to his death. We have held that the proceeding abated by the death of the lunatic and could not be revived. (*In re Beckwith*, 87 N. Y. 504.)

It is insisted by the administrators that no action can be maintained against them by the plaintiff for his services. There was, they insist, no contract and consequently no debt owing by the intestate, and that the plaintiff's only remedy was in an application to the court; that any allowance in such a case is purely discretionary, and that the rendition of services in proceedings to supersede a commission of lunacy, which failed, creates no liability and cannot be made the foundation of any legal claim against the estate of the lunatic after his death. That there was no contract between the lunatic and the plaintiff in the ordinary sense must be admitted. He was incapable of entering into any contract whatever. There can be no mutual assent of minds, which is essential to a voluntary contract, where one of the parties is deprived of reason, and this was the situation of the intestate when the alleged retainer was made, as was conclusively established by the inquisition. The courts do enforce in some cases, on equitable grounds, the acts and contracts of lunatics made before the lunacy has been formally established, where the other party has acted in good faith without notice. (*Mutual Life Ins. Co.* v. *Hunt*, 79 N. Y. 541.) We need not here inquire as to the extent and limitation of this doctrine. But in this case the plaintiff had notice, and the point is whether the law may not imply an obligation enforceable as a claim against a lunatic's estate after his death to pay for services rendered in an unsuccessful application on his part to get rid of an inquisition where the proceedings were fair and not vexatious or groundless, and were founded upon probable cause. This doctrine is sustained by the English courts. (*Wentworth* v. *Tubb*, 1 Younge & C. 171; *S. C.*, 2 id. 537; *Williams* v. *Wentworth*, 5 Beav. 325; *Brockwell* v.

Bullock, L. R. [22 Q. B. Div.] 567; *Rhodes* v. *Rhodes*, L. R. [44 Ch. Div.] 94.) In *Wentworth* v. *Tubb* the question arose on an exception to the master's report, by which a certain sum of money was appropriated from the estate of a deceased lunatic to his solicitor for the costs of an unsuccessful traverse to an inquisition. It was held by the vice-chancellor (Sir J. L. KNIGHT BRUCE) that the costs in such cases were chargeable as a debt against the estate, but he stated the qualification, "subject to this, that if anything fraudulent or unfair, or perhaps I may go so far as to say frivolous or litigious, appear to have taken place on the part of the solicitor, the court may say no debt arises." This ruling we think places the matter upon a reasonable basis. On the one hand it affords no inducement for mere wasteful or groundless litigation, and on the other it enables a lunatic, where the court is of the opinion that reasonable grounds exist for an inquiry as to his continued sanity, to procure necessary assistance in prosecuting it. The court, while it has the control and custody of the lunatic and his estate, may, as we have seen, authorize expenditures to be made in such a case. By the death of the lunatic the possession of his estate is vested in his legal representatives, and the jurisdiction of the court thereafter summarily to administer the estate which before existed ceases. (See *Sherwood* v. *Sanderson*, 19 Ves. 280; *Williams* v. *Wentworth*, *supra*.) There is certainly no reason why the accident of death occurring before the power of the court to settle the question of allowance to an attorney, has been definitively invoked, should cut him off from subsequently claiming compensation from the estate and from the right to have the claim determined upon equitable grounds. We think, therefore, the present action is maintainable.

We are concluded by the findings of the referee, which have been affirmed by the General Term, from reviewing the question of good faith of the plaintiff in instituting the proceedings, and of probable cause. The court, on a full hearing on the part of the petitioner, and of the committee and his relatives, ordered a reference to inquire as to the continued sanity

of the petitioner, thereby giving its sanction to the investigation. It appears that the lunatic had a very considerable estate. He was affected with some delusions which were not disclosed in ordinary conversation; was permitted for years before the investigation to visit his friends in the city of Utica, attend dinners, entertainments, etc., without restraint from the asylum authorities, and that he was regarded by many of his friends and acquaintances as sane. Upon the facts proved and found we think a case was made which authorized a recovery in the action, and that the judgment should be affirmed.

The point that the question of the right of the plaintiff to compensation was *res adjudicata* by the decision of the General Term reversing the order entered upon the report of the referee in the proceedings taken by the plaintiff before the death of the lunatic to procure compensation is not well founded. The order of the General Term reversed the order of the Special Term and vacated the reference, but did not deny the original application. The decision of the General Term may have proceeded on grounds entirely consistent with the claim of the plaintiff to some compensation, as, for example, that the allowance made was excessive. It is incumbent on a party claiming an estoppel to make out a clear case, and it cannot be sustained by doubtful inferences, or where the record is capable of a construction consistent with the subsequent claim.

The point that the General Term could not direct a reduction of the judgment and an affirmance for the reduced amount if the plaintiff consented to the reduction is also untenable. There was no conflict as to the value of the services on the trial. The General Term, somewhat arbitrarily we think, reduced the recovery, and of this the defendants have no reason to complain.

These views lead to an affirmance of the judgment, but, under the circumstances, without costs to either party in this court.

All concur, except O'BRIEN, J., dissenting.

Judgment affirmed.

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128	324
158	684
128	824
162	459
128	324
a164	377

ROXANNA LAWRENCE et al., as Executors, etc., Respondents, *v.* HENRIETTA CHURCH, as Executrix, etc., Appellant.

Upon appeal from a judgment in favor of plaintiff in an action upon a contract, the General Term reversed the judgment, unless plaintiff consented to deduct therefrom a sum specified "without prejudice to a future action to recover the same or any part thereof," and in case of such consent, affirmed the judgment. Plaintiff consented, and the judgment as modified was affirmed. Upon appeal by defendant, *held*, that plaintiff would not be heard to insist that the original judgment was correct, but it was to be assumed that it was erroneous, at least to the extent indicated; also that the court had no power to grant plaintiff the privilege to sue again to recover the amount deducted; and so that defendant was entitled to a reversal and new trial.

The agreement upon which the action was brought was that C., defendant's testator, would pay all the debts allowed or legally established against the estate of S., plaintiff's testator. *Held*, that the decree upon the judicial settlement of the accounts of S., to which accounting S. was made a party, was conclusive as to the amount of debts legally established.

By the agreement C. was to have the benefit of a mortgage belonging to the estate, or the proceeds, if any, after paying the legal and proper expenses and commissions in collecting the mortgage. A demurrer was interposed by the defendant to the complaint herein, which was sustained, with leave to plaintiffs to amend. Upon the accounting plaintiffs were allowed the expenses of their unsuccessful defense to the demurrer, and these were allowed them herein as expenses of administration. *Held*, error; that while such expenses were properly allowed to plaintiffs on their accounting, as between the parties here they could not be regarded as expenses of administration.

But *held*, that with this exception the decree was conclusive evidence as to what the proper and legal expenses of administration were.

The decree was entered subsequent to the commencement of this action, and it allowed as necessary expenses of administration disbursements made by plaintiffs after the action was commenced. *Held*, that in order to prove such items by the decree, application should have been made by plaintiffs under the provisions of the Code of Civil Procedure (§ 544), for leave to permit them to make a supplemental complaint, alleging the entry of the decree as a material fact which occurred since the former complaint was made.

By the agreement C. further agreed to pay to L., one of the plaintiffs, "$3,000, in such manner as will be acceptable to her." The referee allowed interest thereon from the date of the agreement. *Held*, error; that interest would not begin to run until a demand was made or a suit brought.

(Submitted June 19, 1891; decided October 6, 1891.)

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APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1890, which modified, and as modified affirmed, a judgment in favor of plaintiffs entered upon the report of a referee.

In September, 1882, an action was begun by the plaintiffs against Walter S. Church, original defendant and the present defendant's testator, on several promissory notes given by the latter to the plaintiffs' testator in his life-time, amounting in the aggregate to upwards of $12,000, with an allegation of certain payments from time to time to apply thereon. The answer pleaded the Statute of Limitations, denied the allegation of partial payments and set up a counter-claim, to which the plaintiff replied.

On the 4th day of January, 1884, the action above mentioned being pending and at issue as above, the parties thereto entered into a written agreement, of which the following is a copy, and of which a duplicate was signed by George and William Sherman named therein:

"SUPREME COURT.

"ROXANNA H. LAWRENCE, as Executrix, GEORGE SHERMAN, as Executor of the Last Will and Testament of JUDSON W. SHERMAN, Deceased, *against* WALTER S. CHURCH.

"STIPULATED, That Walter S. Church will pay all the debts allowed or legally established against the estate of said deceased, including the mortgage and liens on the real estate of said deceased at the time of the death of said deceased. 2. That said Walter S. Church, defendant as aforesaid, will pay to Roxanna Lawrence aforesaid, the sum of three thousand dollars, in such manner as will be acceptable to her. 3. That said Walter S. Church shall have the benefit of the Thomas J. Chew, Jr., notes and mortgage now belonging to the estate, or the proceeds thereof, if any, after paying the expenses and commissions such as are legal and proper in collecting said mortgage and settling and administering upon the estate. The said Roxanna Lawrence to have the use during her natural

life of the house and lot where she lives, according to the will; she to release to George and William Sherman her life estate in the vacant lot, and said George and William to have the said house and lot subject to the life estate of said Roxanna. When this is all done this action to be discontinued and the notes surrendered.

"(Signed.) W. S. CHURCH.

"ROXANNA H. LAWRENCE,

"Administratrix of J. W. Sherman estate."

"(Witness) JAMES LOCKHART.

"*Jan. 4th*, 1884."

There having been no performance or offer of performance of the foregoing agreement on the part of Church, the plaintiffs commenced this action thereon, joining with them the plaintiff Roxanna H. Lawrence individually. The complaint alleged, in addition to the facts above stated, the further fact that the amount realized on the Chew notes and mortgage, which was alleged to be the sum of $2,902.20, was less by several hundred dollars than the amount of the debts of the estate allowed and paid by them and the costs and expenses of collecting said mortgage and of administration, and demanded judgment against the defendant for such deficiency, in addition to the $3,000 stipulated to be paid to the plaintiff Lawrence.

To this complaint the defendant demurred on the ground, among others, that there was a misjoinder of parties plaintiff. The issues of law thus joined were tried at Special Term, and it was held that there was a misjoinder of parties plaintiff by the joinder of Roxanna H. Lawrence individually as such party, and the demurrer was sustained as to this ground, and judgment was ordered for the defendant thereon, with leave to the plaintiffs to amend. The plaintiffs thereupon amended by striking out the name of Roxanna H. Lawrence as a plaintiff individually, and the action continued.

On the trial the plaintiffs made proof of debts of the estate allowed and paid by them to the amount of $2,401.45. They were also permitted to introduce in evidence, against the

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defendant's objection and exception, the decree of the surrogate made on the judicial settlement of the accounts of the plaintiffs as executors, which allowed the payments above mentioned; and also settled and allowed the costs and expenses of collecting the Chew notes and mortgage, and of the administration and settlement of the estate, including commissions to the plaintiff and expenses incurred after the commencement of this action, at the sum of $950.24. From these figures there resulted a balance of $449.49 as the deficiency in the amount realized on the Chew mortgage to pay the amount of debts and expenses paid by the plaintiffs in settling the estate, and for the amount of such deficiency, together with the $3,000 stipulated to be paid to Roxanna H. Lawrence, with interest, judgment was ordered and entered for the plaintiffs.

Richardson & Robbins for appellant. The judgment of the General Term should be reversed as it held that the referee erred in receiving in evidence the decree made on the 23d day of February, 1889, on the judicial settlement of the plaintiffs' accounts as executors of the estate of Judson W. Sherman, deceased, and the papers and proceedings on such settlement. (*Wisner* v. *Ocunepaugh*, 71 N. Y. 115; *Hall* v. *Olney*, 65 Barb. 27; *Hornpager* v. *Hornpager*, 6 How. Pr. 13; *Stafford* v. *Howlett*, 1 Paige, 200; Code Civ. Pro. § 544; *Whitehead* v. *Kennedy*, 69 N. Y. 462; *Cuff* v. *Dorland*, 57 id. 560; *Williams* v. *Fitch*, 18 id. 546; *Foote* v. *Beecher*, 78 id. 155; *In re Smith*, 95 id. 516, 527; *Baird* v. *Gilbert*, 47 id. 186; *Pinney* v. *Orth*, 88 id. 447; *Worrall* v. *Parmalee*, 1 id. 519.) The sum which the General Term ordered deducted from the plaintiffs' judgment did not form a separate item of the recovery, and could not be separated from the judgment so as to allow the balance to stand. (*Goodsell* v. *W. U. T. Co.*, 109 N. Y. 147, 151; *Crim* v. *Starkweather*, 88 id. 339; *Cockerill* v. *Loonam*, 36 Hun, 353.) The General Term had no power to modify the judgment by deducting $950.24 therefrom "without prejudice to a new action to recover the same." (*Goodsell* v. *W. U. T. Co.*, 109 N. Y. 147; *Wostenholme* v.

W. F. Mfg. Co., 64 id. 272; *Story* v. *N. Y. & H. R. R. Co.*, 6 id. 95; *O'Beirne* v. *Lloyd*, 43 id. 248; *Secor* v. *Sturgis*, 16 id. 548; *Bendernagle* v. *Cocks*, 19 Wend. 207.) The referee erred in allowing interest upon the various sums payable under the contract, and for this reason the judgment should be reversed. (*Ledyard* v. *Bull*, 119 N. Y. 62; *Smith* v. *Velie*, 60 id. 106; *White* v. *Miller*, 78 id. 393.) The referee erred in denying the motion for a nonsuit. (*Kromer* v. *Heim*, 75 N. Y. 576, 577; *Noe* v. *Christie*, 51 id. 270; *Russell* v. *Lytle*, 6 Wend. 390; *Daniels* v. *Hallenbeck*, 19 id. 408; *Brooklyn Bank* v. *DeGrauw*, 23 id. 342; *Day* v. *Roth*, 18 N. Y. 448; *Tilton* v. *Alcott*, 16 Barb. 598; *Mitchell* v. *Hawley*, 4 Denio, 414; *Dolsen* v. *Arnold*, 10 How. Pr. 528; *Panzerbeiter* v. *Waydell*, 21 Hun, 161; *Breman* v. *Ostrander*, 18 J. & S. 426; *Van Campen* v. *Ford*, 15 N. Y. S. R. 310; *Cauhape* v. *Park*, 121 N. Y. 152; *People* v. *Stevens*, 38 id. 63; *Hawley* v. *Singer*, 5 Dem. 82; *Ferguson* v. *Ins. Co.*, 22 Hun, 320; *Shaw* v. *Broadhbent*, 26 N. Y. S. R. 836.)

J. H. & C. W. Stevens for respondents The plaintiffs are entitled to recover at least the amount found by the referee. (2 Pars. on Cont. 195; *Davis* v. *Spencer*, 24 N. Y. 386; *Morehouse* v. *Bank*, 98 id. 503; *Wahl* v. *Barnum*, 116 id. 95; *Eddy* v. *Davis*, Id. 254; *Dums* v. *Milne*, 113 id. 303; *Kirtz* v. *Peck*, Id. 222; 1 Chitty on Cont. 42, 44; *Lawrence* v. *Fox*, 20 N. Y. 268; *Tilton* v. *Alcott*, 16 Barb. 598; 2 Abb. [N. C.] 81; 75 N. Y. 574.) The decree of the Surrogate's Court is competent evidence. (*Pray* v. *Hegeman*, 98 N. Y. 531; *C. Co.* v. *Walker*, 114 id. 7; *Tousey* v. *Roberts*, Id. 312.) No objection is made by answer or motion for a nonsuit raising the question that these plaintiffs cannot recover for the $3,000 agreed to be paid to Roxanna H. Lawrence, although by the will she is entitled to $5,000. (*Bingham* v. *M. Bank*, 41 Hun, 377; 112 N. Y. 661.)

PECKHAM, J. The General Term upon defendant's appeal, reversed the judgment for plaintiffs entered upon the report of the referee and granted a new trial, unless the plaintiffs

consented to deduct from the judgment the sum of $950.24, with interest from February 23, 1889, "without prejudice to a future action to recover the same or any part thereof," and in case the plaintiffs did so consent, the judgment thus modified was affirmed, without costs of the appeal to either party.

The plaintiffs consented to make the deduction and the amount named was thereupon deducted from the judgment (without prejudice as above stated), and as thus modified the judgment was affirmed, and from the affirmance the defendant has appealed here. The plaintiffs of course did not appeal, having consented to make and making the deduction as provided for by the order of the General Term.

Whether the General Term were correct in ordering a reversal unless this deduction were made, is a question which is not before us and which, therefore, we are not to inquire into. The alternative was granted plaintiffs to reduce their judgment and retain it as reduced, or submit to a total reversal. They elected to reduce it as provided by the General Term and it was reduced accordingly, and as reduced it was affirmed. We must now assume that the original judgment entered upon the report of the referee was erroneous at least to the extent indicated by the decision of the General Term, and the plaintiffs cannot be heard to insist that such original judgment was correct.

This has been expressly decided in this court. (*Whitehead v. Kennedy*, 69 N. Y. 462.)

Assuming the General Term was right in reversing the judgment and granting a new trial, it is insisted that the privilege permitting the plaintiffs to deduct the sum named without prejudice to a future action by them to recover the same or any part thereof, was illegal and beyond the power of the court to grant. We are of that opinion.

We think the court had no power to grant the privilege to the plaintiff to sue again to recover the amount deducted from this judgment or any part thereof.

So far as the plaintiffs are concerned, the liability of the defendant's testator was solely under the agreement, and it was

indivisible and could not be split up into two or more claims or causes of action in their favor. They could have but one cause of action founded upon the agreement, and the liability of the defendant's testator could not be enlarged by any order of the court. The result of the decision of the General Term is to permit a recovery in this action for a portion of defendant's liability upon the agreement, with costs of the trial, and to grant to plaintiffs the right to commence a new action to recover the balance of defendant's liability arising upon the same agreement, with costs in case of recovery. This is improper. (*Whitehead* v. *Kennedy*, *supra*.) If the General Term did not desire to grant a new trial unconditionally, the alternative should have been a modification of the judgment by the deduction of the amount regarded as erroneous, without any privilege of again suing for the same. Such a modification, when assented to by the plaintiffs and resulting in the affirmance of the judgment as modified, would, upon the facts in this case, have operated as an abandonment by plaintiffs of the amount deducted.

If the plaintiffs were not satisfied with such an affirmance, they could refuse to avail themselves of the privilege offered, and go back for a new trial upon the whole issues involved in the case.

Upon this appeal, we think we should now reverse the judgment entered upon the order of the General Term, and also that entered upon the report of the referee, and grant a new trial absolutely. The judgment, as modified by the General Term, we hold to be erroneous, and we ought not, under the facts in this case, to modify it on the terms which we hold the General Term might have legally imposed, because we think there were other errors in the case which in justice require us to reverse the judgment as it stands.

Some questions will arise on the new trial, which it is proper for us to now express an opinion in regard to.

The agreement upon which the action is brought provides that defendant's testator will pay all the debts allowed or legally established against the estate of the deceased, Judson W. Sherman.

The decree entered upon the judicial settlement of the accounts of the executors, to which accounting the defendant's testator was a party, would be conclusive of the amount of the debts which had been legally established.

It would also be conclusive evidence of the expenses of settling and administering upon the estate. The defendant's testator agreed that such expenses as were legal and proper in the administration of the estate should be deducted from the proceeds of the Chew mortgage and only the balance thereof should be credited to him.

We do not think the agreement can be construed as including expenses incurred by the plaintiffs in their unsuccessful defense to the defendant's demurrer in this case. Such expenses are not, as between the parties to the agreement, expenses of administration to be deducted from the proceeds of the Chew mortgage. They never could have been in the contemplation of the parties. It is not possible for us to so construe this agreement as to hold that expenses incurred in such a case, or costs paid to the defendant's testator, under such circumstances, were to be regarded as administration expenses and allowed for by him.

While such expenses may properly be claimed by the plaintiffs to have been expenses of administering the estate, and hence justly allowed to them in their final accounting, we do not think they can be so regarded as between the parties to the agreement. Those particular expenses, therefore, are not to be deducted from the proceeds of the Chew mortgage before the defendant can receive the benefit thereof. The decree is, however, conclusive evidence as to what the proper and legal expenses of administration were, and the amount thereof should be deducted from the proceeds of the mortgage, with the exception above stated.

One of the issues to be determined in this action was the amount of the debts of the late Judson W. Sherman, which had been legally established. Another was the amount of the legal and proper expenses of settling and administering upon the estate. Upon both these issues the decree in question was

competent and conclusive evidence, and, therefore, it determined a part of the matters in controversy in this action.

The decree was, however, entered subsequent to the commencement of this action, and it allowed among the necessary expenses of administration, disbursements made by the plaintiffs after the action herein was commenced. We think, in order to prove such items by the decree, that application should be made by the plaintiffs under section 544 of the Code for leave to permit them to make a supplemental complaint alleging the entry of this decree as a material fact which has occurred since the former complaint was made, and upon the granting of such order the decree proving all the proper items, subsequent as well as prior to the commencement of this action, can be properly put in evidence on the trial.

There is a question of interest which, we think, was erroneously decided by the referee.

The defendant's testator in the agreement promised that he would "pay to Roxanna Lawrence aforesaid the sum of three thousand dollars, in such manner as will be acceptable to her." The referee allowed interest thereon from the date of the agreement, January 4, 1884. The money by this agreement would become due on demand. I do not think it would draw interest until a demand was made or until a suit was commenced. The plaintiffs were not bound before making the demand to wait for the collection of the Chew mortgage and the closing of the estate, and the final determination of the amount of the "benefit" to be given to the defendant's testator in the way of proceeds of such mortgage.

This "benefit" he was to receive when the mortgage was collected and the deductions for costs of collection and legal and administration expenses had been made, but his promise to pay the $3,000 was not contingent upon the collection of the mortgage, nor was he to pay only the balance of the $3,000 remaining after the proceeds of the mortgage had been applied to such payment. The two matters were in this respect independent of each other. He had agreed unconditionally to pay the $3,000 to Roxanna Lawrence. What he might thereafter

be allowed from the proceeds of the mortgage after making the proper deductions would in the final result diminish the amount of his expenditures under and by reason of the agreement, but the receipt of such proceeds was not a condition precedent to his obligation to make that payment. As to interest upon the debts of the deceased Sherman paid by the plaintiffs, the referee allowed it upon the balance of the debts, expenses and commissions over and above the amount of the collection of the Chew mortgage, to be cast from the date of the final accounting, February 23, 1889, and he found the sum to be $449.49. This sum was arrived at by allowing some items for administration expenses, which we have already held to be improper, and hence the result would be less than the above named sum.

The amount of the "expenses and commissions in collecting the Chew mortgage and settling and administering the estate," the defendant's testator did not agree to pay. He merely consented that such amount might be deducted from the proceeds of the Chew mortgage, which he was to receive the benefit of.

While the method of casting the interest pursued by the referee was not based upon precisely accurate principles, the result arrived at was exactly the same as if the other and proper method had been pursued. After the entry of the decree all the items appeared which were necessary to be known in order to arrive at the amount of defendant's indebtedness by reason of the agreement, outside of the $3,000, and that amount was then due the estate and interest should run upon it from the date of the entry of the decree.

Upon the question of the consideration for the agreement we may assume without deciding that the General Term was in error in regarding the defendant concluded by the order entered upon the demurrer. In that case the question is open here. We think the consideration was ample. There were mutual promises and each stood as the consideration for the other.

We think, therefore, that the proper order for us to make

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is to reverse the judgment in favor of plaintiff entered upon the order of the General Term, and also the original judgment entered upon the report of the referee, and to grant a new trial absolutely, with costs to abide the event, and we direct accordingly.

All concur.

Judgment accordingly.

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HARRIET E. JOSLYN, as Administratrix, etc., Appellant, *v.* GEORGE H. ROCKWELL et al., as Administrators, etc., Respondents.

The provision of the act "in relation to the collection of taxes on lands of non-residents" (Chap. 427, Laws of 1855 as amended by chap. 448, Laws of 1885), declaring that after a certain time a deed of the comptroller, executed upon sale for the non-payment of taxes, shall be "conclusive evidence" that "the sale * * * and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of two years allowed by law to redeem, were regular and regularly given, published and served" does not cure jurisdictional defects.

As said act is one by its title relating "to the collection of taxes on lands of non-residents," and as in the purview of the tax laws. occupied lands are not lands of non-residents (1 R. S. 389, § 3) where lands of a non-resident are occupied by a resident the act does not apply thereto, and an assessment thereof to the owner in the "non-resident" part of the roll is illegal.

As to whether a statute making a tax deed, after a certain designated time, conclusive evidence of the existence of every fact necessary to create a good title under the deed, would be a valid exercise of legislative power, as against the original owner who had always been in possession and whose possession remained undisturbed up to the time of the bringing of an action to obtain possession under the tax deed, and where said owner had in fact either paid his taxes before sale or a merely formal sale was made which was void for want of jurisdiction, *quære*.

In an action of trespass, the plaintiff claimed title under deeds from the comptroller, executed on sales for unpaid taxes. The lands were assessed as non-resident lands; defendants were permitted to give evidence which tended to show that at the time of assessment they were occupied by a resident; also that said taxes were paid to the collector before he made his return to the county treasurer. These questions were submitted to the jury, who were charged that if the lands were occupied when

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assessed, the assessment was void, or if the taxes had been paid before being returned to the comptroller, all proceedings after payment were void. *Held*, no error.

Reported below, 59 Hun, 129.

(Argued June 22, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 4, 1891, which affirmed a judgment in favor of defendants entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action of trespass.

Plaintiff claimed title under two deeds of the state comptroller executed upon sales of lands, including the *locus in quo*, for non-payment of taxes.

The facts, so far as material, are stated in the opinion.

James C. Rogers for appellant. Defendants' answer denying every allegation in the plaintiff's complaint contained, except as hereinafter expressly admitted, stated or qualified, is bad in form and not authorized by the Code. (*Thierry* v. *Crawford*, 33 Hun, 366; *McEncroe* v. *Decker*, 58 How. Pr. 250; *Clark* v. *Dillon*, 97 N. Y. 370; *Potter* v. *Smith*, 70 id. 397; *Thorn* v. *N. Y. C. Mills*, 10 How. Pr. 19; *Hale* v. *Wood*, 1 Paige, 404; *Lewis* v. *Acker*, 11 How. Pr. 163.) Defendants should not have been permitted on the trial against plaintiff's objections to introduce evidence to prove title and possession in themselves at the time of the trespass. (*Potter* v. *Smith*, 70 N. Y. 300; *Klinger* v. *Bondy*, 36 Hun, 601.) The rulings of the trial judge at the outset of the trial that the defendants may offer any kind of proof that tends to show the plaintiff has no title, was error. (*Duncan* v. *Spear*, 11 Wend. 54; *Rogers* v. *Arnold*, 120 id. 30; *Kissam* v. *Roberts*, 6 Bosw. 154.) The comptroller's deeds to Gerrit Smith were conclusive evidence that the sale and all proceedings prior thereto were regular, having been recorded more than two years. (Laws of 1885, chaps. 448, 758; *People* v. *Turner*, 49 Hun, 466; 117 N. Y. 227.) The trial judge erred in allowing

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defendants to introduce as showing irregularity in the assessments, not only the original assessment-rolls from the county treasurer's office, but copies of the rolls from the town clerk's office, and in one instance memoranda made by the defendants' attorney from a copy of the roll. (2 R. S. [7th ed.] 996, § 35; *People ex rel.* v. *Chapin*, 38 Hun, 272.) It was error to allow the word "paid" in pencil mark upon the assessment-rolls, with no evidence as to when it was put there, to be received in evidence against plaintiff's objection, and go to the jury to contradict the collector's sworn return, and the county treasurer's certificate. (Laws of 1855, chap. 427, § 4; id. chap. 453; *People ex rel.* v. *Chapin*, 38 Hun, 272.) Even if the tax was paid on the forty-acre lot in those years, it is a matter in which defendants are not interested, and they were not entitled to set it up as against the constitutionality of the act of 1885, and the validity of plaintiff's title under the comptroller's deeds. (*Detmold* v. *Drake*, 46 N. Y. 318; *Vose* v. *Cockroft*, 44 id. 415; *Connors* v. *People*, 50 id. 240; *Houston* v. *Wheeler*, 52 id. 641; *People* v. *Turner*, 117 id. 234.) If the statute be construed to require that the lands of a non-resident owner, if occupied, must be assessed to the occupant, and not as non-resident, in that case there must be an actual not a constructive occupation of at least a portion of the lot assessed. (Code. Civ. Pro. §§ 369, 370.) It was error to allow defendants, against objections, to introduce evidence designed to show irregularities in the assessment and sale of the 208 acre piece, known as the Murray lot. (*People ex rel.* v. *Chapin*, 38 Hun, 272; *Chamberlain* v. *Taylor*, 36 id. 24.) The refusal to charge that the payment of taxes, the survey of land, and the assertion of right to it, the cutting of trees, and the running of the lines around wild land do not constitute possession or title, was error. (*Thompson* v. *Burhans*, 61 N. Y. 52; 79 id. 99; *Miller* v. *L. I. R. R. Co.*, 71 id. 380; *Price* v. *Brown*, 100 id. 669.) The trial judge erred in charging the jury that: "There is some considerable question if the defendants would be liable for that cutting, if it was done without their direction, even if it was

conceded that they had gone across the line." (*Carman* v. *Mayor*, 14 Abb. Pr. 301; *Cosgrove* v. *Ogden*, 49 N. Y. 255; *Nott* v. *C. Ice Co.*, 73 id. 543; *Poucher* v. *Blanchard*, 86 id. 256.) Chapter 448, Laws of 1885, under which plaintiff claims, is an act of limitation mainly, and although it changes the rule of evidence in regard to the effect to be given the comptroller's deeds, it violates no constitutional or vested rights thereby. (*Chamberlain* v. *Taylor*, 36 Hun, 24; *Rogers* v. *Smith*, 5 id. 475; 86 N. Y. 623; *Hickcox* v. *Tallman*, 38 Barb. 608; *Webb* v. *Den*, 17 How. [U. S.] 576; *Jackson* v. *Lamphire*, 3 Pet. 290; *Rexford* v. *Knight*, 11 N. Y. 308; *People* v. *Turner*, 117 id. 227.) The trial judge erred in charging "that the act in question is not intended to cure jurisdictional defects but only relates to the matters of the form of the proceeding." (*People* v. *Turner*, 117 N. Y. 235; Laws of 1855, chap. 427, §§ 83–85.)

J. S. L'Amoreaux for respondents. The plaintiff failed to show any title whatever to any portion of subdivision 4, lot 5, Kayaderosseras patent, claimed by the defendants. (Laws of 1840, chap. 180, § 3.) A sale of land for the taxes of several years, one of which is void, is an excess of jurisdiction in the officer making the sale, and renders his proceeding void. (*People* v. *Hagadorn*, 107 N. Y. 516, 525; *Ensign* v. *Barse*, Id. 329; *People* v. *Turner*, 117 id. 227; *Cromwell* v. *McLean*, 123 id. 492; *Howard* v. *Moot*, 64 id. 268; *Ferguson* v. *Crawford*, 70 id. 253.) The evidence justified the finding that the seventy acres in question were occupied and resident lands during all the years from 1846 to 1860, both inclusive. (*Thompson* v. *Burhans*, 61 N. Y. 52; *In re N. Y. C. & H. R. R. R. Co.*, 90 id. 342; *In re Rau*, 70 id. 191; *Tallman* v. *White*, 2 id. 66; *Sharpe* v. *Johnson*, 4 Hill, 92; *Bank of Utica* v. *Mersereau*, 3 Barb. Ch. 531; *Peck* v. *Mallams*, 10 N. Y. 509; *Pink* v. *Barberi*, 17 Wkly. Dig. 521; *Whiting* v. *Thomas*, 23 N. Y. 281; *Maller* v. *L. I. R. R. Co.*, 71 id. 380; *Vosburgh* v. *Teator*, 32 id. 561; *Ferguson* v. *Hubbell*, 97 id. 507.)

Opinion of the Court, per PECKHAM, J.

PECKHAM, J. In *Ensign* v. *Barse* (107 N. Y. 329), the statute provided that under certain circumstances named in the act the comptroller's deed should be "conclusive evidence" that "the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices heretofore or hereafter required by law to be given, previous to the expiration of the time allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of all laws requiring and directing the same or in any manner relating thereto."

The plaintiffs here claim title under two deeds from the comptroller to Gerrit Smith, executed by reason of sales of the land for non-payment of taxes. In 1885, long subsequent to such sales and conveyances by the comptroller, the legislature passed the act known as chapter 448, of the laws of that year, and it was provided therein that after certain times therein stated, the deeds of the comptroller executed upon sales for the non-payment of taxes, should be "conclusive evidence" that "the sale of said lands and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same or in any manner relating thereto." The comptroller's deeds under which the plaintiff claims, were executed and recorded in due time so as to come within the purview of this act.

It is evident that, upon the subject of the conclusive character of the comptroller's deed, the act of 1885 does not differ in any material respect from the act already quoted, and which was under discussion in the case of *Ensign* v. *Barse* (*supra*). It must, therefore, receive the same construction which was given the act in that case. It was there said that the act did not, on its face, purport to cure jurisdictional defects. Judge FINCH, in the course of his opinion, declared that the act "raises a conclusive presumption of regularity, but leaves the question of the assessors' jurisdiction and authority unaffected.

Thus understood it comes within the rule which counsel concede to be correct. It does not make the tax deed conclusive evidence of a complete title, but leaves open to the owner full right to assail the proceedings in any jurisdictional defect." This construction was concurred in by the whole court. Nothing in the cases of *People* v. *Turner* (117 N. Y. 227) and *Ostrander* v. *Darling** (in the second division of this court, and not yet reported) enlarges the construction to be given the act of 1885.

It has not been held in any case in this court that I am aware of that a statute making a tax deed after a certain time designated in the statute, conclusive evidence of every fact which ought to exist in order to create a good title under such deed, would be valid as an exercise of legislative power as against the original owner who had always been in possession of his land, and of all his rights growing out of it, and whose possession remained undisturbed up to the time of the commencement of an action to obtain possession under a tax deed, and where the owner had in fact either paid his taxes before sale or a merely formal sale had been made, which was void for want of jurisdiction. The record of a deed from the comptroller it is contended would constitute no valid notice. It is claimed that one in possession of all his rights cannot be compelled to resort to legal proceedings or else run the risk of losing them. The question does not arise in this case, for we hold, as in the case of *Ensign* v. *Barse* (*supra*), that the statute is not to be construed in that way. There is very weighty authority for holding such a statute in the case of one in possession to be invalid. (Cooley's Constitutional Limitations [3d ed.], 366, and cases cited in note 1.) We leave the matter without expressing an opinion in regard to it.

For the purpose of showing that the deeds of the comptroller were void as given without jurisdiction, evidence was offered by defendants and received by the court, which tended to show that the taxes, for the non-payment of which the lands were sold by the comptroller, were assessed as lands of a

* 127 N. Y. 70.

non-resident, while at that time they were occupied by some one representing defendants' grantor. It was submitted by the court as a question of fact to be passed upon by the jury, whether the lands at the time of the assessment were occupied. There was also some evidence on the part of the defendants tending to show that the taxes upon these lands were paid to the collector before the return was made by the collector to the county treasurer. The court instructed the jury that if the lands were occupied when assessed as lands of a non-resident, or if the taxes had in fact been paid before the return was made to the comptroller, then in the one case the assessment was void, and in the other case all proceedings after the payment were void.

We think the court was right in both branches of its charge. The defect was jurisdictional in both cases. The act of 1885 (Chap. 448) is one, by its title, relating "to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes." It is provided that occupied lands are not the lands of non-residents. (1 R. S. 389, § 3.) And where lands of a non-resident of the county are occupied by a resident of the town, an assessment to the owner in the "non-resident" part of the roll is illegal, and the lands should be assessed to the resident occupant. (*People ex rel.* v. *Wemple, Comptroller*, 117 N. Y. 77.) If the lands were occupied the act of 1885 would not apply. We think there was sufficient evidence of occupancy to render it a question for the jury, and it was properly submitted as such.

If the taxes had in truth been paid to the collector before he made return to the county treasurer, the right to proceed further toward the sale of the lands for non-payment of the taxes at once ceased. The comptroller had no jurisdiction to make the sale or to execute the conveyances of the lands in question. There was enough evidence of such payment to make it also a question for the jury. We think the evidence of payment to the collectors was properly admitted.

Both these questions were of a character not covered by the act of 1885, and no error was committed in receiving evidence

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relative to them and which tended to show the facts upon which the defendants' contentions were to be sustained.

We have carefully examined all the other questions raised by the learned counsel and set forth in his able brief, but we think no errors were committed by the trial court in disposing of them.

We are of the opinion that the judgment below is right, and it should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN P. CRANFORD et al., Respondents, *v.* MARTIN D. TYRRELL, Appellant.

It seems the mere fact that a business is being carried on, which may be shown to be immoral and, therefore, prejudicial to the neighborhood, furnishes of itself no ground for equitable interference at the suit of a private person. Although the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action.

It seems also, that only the public authorities, acting in the common interest, can interfere for the suppression of a common nuisance.

The fact, however, that the perpetrator of a nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person who has sustained special damage, to recover the same and to restrain a continuance of the nuisance.

An unlawful use of property which renders the premises of a neighbor unfit for comfortable or respectable occupation and enjoyment is a private nuisance, against which the protection of a court of equity may be invoked, although the use complained of also constitutes a public nuisance.

In an action to restrain defendant, who was plaintiffs' adjoining neighbor in a city, from keeping a house of ill-fame and using his premises as an assignation house and to recover damages, the court found that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that persons occupying rooms in it acted in a boisterous and noisy manner and indecently exposed their persons at the window, "whereby the use and occupation of the plaintiffs' premises had been interfered with and rendered uncomfortable" and the occupants of their house "annoyed and seriously disturbed." The court granted the relief prayed for. *Held*, no error.

(Submitted June 22, 1891; decided October 6, 1891.)

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APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1891, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

James & Thomas H. Troy for appellant. To maintain a civil action for damages arising out of the commission of a crime the plaintiff must have sustained some damage not common to the public. (*Francis* v. *Schoellkopf*, 53 N. Y. 152; *Butler* v. *Kent*, 19 Johns. 223; *Davis* v. *Mayor, etc.*, 14 N. Y. 506; *Ayres* v. *Lawrence*, 63 Barb. 454; *Adams* v. *Popham*, 76 N. Y. 410; *K. I. Co.* v. *Shultz*, 116 id. 383; *Lansing* v. *Smith*, 8 Cow. 146; *Dougherty* v. *Bunting*, 1 Sandf. 1; *F. P. B. Co.* v. *Smith*, 30 N. Y. 44; *Harrower* v. *Ritson*, 37 Barb. 307; *Callanan* v. *Gilman*, 107 N. Y. 360; *Lawton* v. *Steele*, 119 id. 226.) A house of prostitution is a public nuisance, and the keeping or maintaining thereof a misdemeanor. The law provides a mode and manner by which it may be summarily suppressed and the offender punished. (Penal Code, §§ 322, 386, 387; *Ely* v. *Supvrs., etc.*, 36 N. Y. 297.)

Alfred E. Mudge and *Johnson & Lamb* for respondents. A "bawdy house" is undoubtedly a common nuisance, and the well-established rule is that a person "maintaining a common nuisance is liable at the suit of one who has sustained damage peculiar to himself." (*Francis* v. *Schoellkopf*, 53 N. Y. 152; Wood on Nuisances [2d ed.], 718, 886; *Callanan* v. *Gilman*, 107 N. Y. 360; *Flynn* v. *Taylor*, 53 Hun, 167; *Robinson* v. *Smith*, 25 N. Y. S. R. 647.) The plaintiffs have sustained special damages. (*Francis* v. *Schoellkopf*, 53 N. Y. 152; *Farrell* v. *Cook*, 49 Am. Rep. 721; *Marsan* v. *French*, 48 id. 272; *Givens* v. *Van Studdiford*, 56 id. 421; Wood on Nuisances [2d ed.], 738.) The plaintiffs were entitled to recover

the amount of the rental value of their property for the period it was not rented in consequence of the nuisance; and while rented, the difference between the rental value free from the nuisance and subject to it. (*Francis* v. *Schoellkopf*, 53 N. Y. 152; Wood on Nuisances, 754.)

GRAY, J. In this action, which was brought to restrain the defendant from keeping a house of ill-fame and from using his premises as an assignation house, and to recover damages for injuries sustained, the trial court found as facts that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that the persons occupying rooms acted in a boisterous and noisy manner, and indecently exposed their persons at the windows, "whereby the use and occupation of the plaintiffs' premises have been interfered with and rendered uncomfortable, and whereby the occupants of plaintiffs' premises have been annoyed and seriously disturbed."

Such a finding was amply justified by the evidence and, indeed, it is not discussed by the appellant; but he argues that the plaintiffs could not maintain a civil action of this nature; inasmuch as the damage they suffered was a damage common to the whole community, and not special to them. If that position had been sustained by the facts, I do not doubt but that it would have been the duty of the trial court to have denied the relief prayed for.

The rule of law requires of him who complains of his neighbor's use of his property, and seeks for redress and to restrain him from such use, that he should show that a substantive injury to property is committed. The mere fact of a business being carried on, which may be shown to be immoral and, therefore, prejudicial to the character of the neighborhood, furnishes, of itself, no ground for equitable interference at the suit of a private person; and though the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. It is for the public authorities, acting in the common interest, to interfere for the suppres-

sion of the common nuisance. (See *Francis* v. *Schoellkopf*, 53 N. Y. 152.)

If the business complained of is a lawful one, the legal question presented in a civil action for private damage is whether the business is reasonably conducted, and whether, as conducted, it is one which is obnoxious and hurtful to adjoining property. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit, or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner. The principle has been long settled that the objection that the nuisance was a common one is not available, if it be shown that special damage was suffered. (*Rose* v. *Miles*, 4 M. & S. 101; *Rose* v. *Groves*, 5 Man. & G. 613; *Francis* v. *Schoellkopf*, *supra*; *Lansing* v. *Smith*, 4 Wend. 9.) One who uses his property lawfully and reasonably, in a general legal sense, can do injury to nobody. In the full enjoyment of his legal rights in and to his property, the law will not suffer a man to be restrained; but his use of the property must be always such as in no manner to invade the legal rights of his neighbor. The rights of each to the enjoyment and use of their several properties should, in legal contemplation, always be equal. If the balance is destroyed by the act of one, the law gives a remedy in damages, or equity will restrain. If the use of a property is one which renders a neighbor's occupation and enjoyment physically uncomfortable, or which may be hurtful to the health, as where trades are conducted which are offensive by reason of odors, noises, or other injurious or annoying features, a private nuisance is deemed to be established, against which the protection of a court of equity power may be invoked.

In the present case the indecent conduct of the occupants of the defendant's house and the noise therefrom, inasmuch as

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they rendered the plaintiffs' house unfit for comfortable or respectable occupation, and unfit for the purposes it was intended for, were facts which constituted a nuisance, and were sufficient grounds for the maintenance of the action. If it was a nuisance which affected the general neighborhood and was the subject of an indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for any injury sustained and to their equitable right to have its continuance restrained.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

THE WATERLOO WOOLEN MANUFACTURING COMPANY, Respondent, *v.* JAMES SHANAHAN, as Superintendent, etc., et al., Appellants.

128	345
j 155	290
j 155	435
128	345
156	584
128	345
160	389

The general improvement of those public highways of the state, its canals and its navigable rivers, is for the benefit of the public at large, although some locality or individual may be benefited more than others.

Although an expenditure authorized by the legislature for such an improvement may be improvident or the work prove useless to the public, it may not be assailed in the courts at the suit of a private individual. The legislature, as the depository of the sovereign power of the people, is the exclusive judge of the propriety of the expenditure or the utility of making it.

It seems that generally the question as to whether the use to which private property is proposed to be devoted by legislative power is public or private, is a judicial one and the courts are not concluded by any declaration of the law-making power as to the nature of the use.

It seems also that where the legislature appropriates public money for some improvement, the courts may inquire whether the improvement is for a purpose which is public or one merely private or local, and if the purpose is private or local, whether the bill received the requisite two-thirds vote.

The question, however, as to the nature of the purpose, must be determined by the language and general scope of the act; the judicial inquiry must be confined to the face of the bill itself and to things that are the subject of judicial notice.

Where, therefore, the purpose declared in an act appropriating public money is a public one, the courts have no power, upon a suggestion that

the professed purpose was not the real one, to institute an inquiry upon the testimony of witnesses, and to determine the purpose as a matter of fact.

The courts cannot inquire into the motives and purposes of the legislature in order to attribute to it a design contrary to that clearly expressed or fairly implied in its enactment. It must be assumed that the legislature acted in good faith and meant what the bill expressed, although it may be possible to show, outside of its language and terms, that in fact all or the larger part of the benefits following the expenditure will inure to a few individuals.

In an action to restrain the state officials and contractors with them from doing work authorized by the act of 1888 (Chap. 325, Laws of 1888), entitled "An act to provide for the dredging and excavating the channel of Seneca river and the old Bear race * * * to facilitate the passage of canal boats," which action was based upon the ground that the declared purpose of the act was not the real one, but that it was in fact simply for the benefit of individuals, and so was void, as it appropriated public money for a local and private purpose and did not receive the assent of two-thirds of either house of the legislature (State Const. art. 1, § 9), the court, against the defendants' objection and exception, entered into an inquiry in regard to the purpose of the appropriation, and after receiving the testimony of witnesses, found as a fact that the improvement could not benefit the canal, but would benefit the property of individuals, and that the purpose of the appropriation was not public, but private. *Held*, error; that the purpose expressed in the act was public, and even if the expenditure might be improvident and the work useless to the public, of its propriety and utility the legislature was the judge; that it could not be said that the state authorities were not proceeding in good faith, the more particularly as the legislature in 1889 (Chaps. 461 and 493, Laws of 1889) reappropriated the money to the same improvement, increasing the amount.

It appeared that prior to the passage of the act, the state had diverted the waters of said river into the Cayuga and Seneca canal, and so deprived riparian owners, on the south side of the river, of its use. *Held*, assuming that the court had power to make the inquiry and that the purpose of the act was, as was claimed by plaintiff, to restore a portion of the water so diverted to its original channel and the use of said owners, the purpose of the expenditure was public, not private or local, within the meaning of the Constitution, and so, that the act was valid.

The court below also held the act to be invalid, because the effect was to take the plaintiff's property for private purposes. This determination was based solely upon the fact that the improvement would divert from the canal and restore to the channel of the river, water, the use of which plaintiff had enjoyed without question for more than twenty years, he having no property right therein save as acquired by such user. *Held*, error; that the use by the plaintiff of the water beyond what it was

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entitled to, however long continued, and whether adverse or by permission, could not impair the rights of the state; and that, so long as the legal rights of the plaintiff, as between it and the state, were respected, it could not complain.

Also *held*, that if plaintiff could establish any right to the use of the water that would be diverted by the improvement, the consequence would be an injury which would form the basis for a claim for damages or compensation before the tribunal authorized by the state to hear such claims, but would furnish no ground for an injunction; that the execution of the work did not involve the taking of any of plaintiff's property for any purpose, public or private.

Property required by the state for canal purposes may be taken in a summary way without the aid of judicial proceedings; the title or the right to the use may be acquired at any time, and need not be obtained in advance,

Waterloo Woolen Mfg. Co. v. *Shanahan* (58 Hun, 50), reversed.

(Argued June 22, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

Charles F. Tabor, *Attorney-General*, for appellant James Shanahan. Whether chapter 325 of the Laws of 1888, appropriated money for local or private purposes only, is a question for the courts to determine. (*In re D. C. Assn.*, 66 N. Y. 569.) Private property cannot be taken by eminent domain for private purposes either with or without compensation. (*S. M. Co.* v. *State*, 104 N. Y. 562.) Chapter 325 of the Laws of 1888 is constitutional. (Const. art. 3, §§ 20, 21; art. 7, § 8.) The propriety or the necessity of taking private property for public use is not a judicial question, but one of political sovereignty, to be determined by the legislature, either by itself or by delegating the power to public agents in such manner and form as it may prescribe. (*People* v. *Herrick*, 21 N. Y. 595; *Beekman* v. *S. & S. R. R. Co.*, 3 Paige, 73;

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Varick v. *Smith*, 5 id. 159; *Bloodgood* v. *M., etc., R. R. Co.*, 18 Wend. 9; *Haywood* v. *Mayor, etc.*, 3 Seld. 324; *In re Townsend*, 39 N. Y. 174; *R. & S. R. R. Co.* v. *Davis*, 43 id. 142; *People* v. *Budd*, 117 id. 25; *Amy* v. *Watertown*, 130 U. S. 319.) The appropriation made by chapter 525 of the Laws of 1888, so far as it provides for the improvement of the channel of Seneca river, and dredging and excavating Bear race, "so as to admit the passage of canal boats therein from said canal," is not, within the meaning of the Constitution, for a private purpose. (*Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 19; *In re Village of Middletown*, 82 N. Y. 196; *People* v. *McCann*, 16 id. 58.) Neither is it a local act, within the meaning of the Constitution. (*People ex rel.* v. *Bd. Supvrs.*, 43 N. Y. 10; *Healy* v. *Dudley*, 5 Lans. 115, 120; *Williams* v. *People*, 24 N. Y. 405; *People ex rel.* v. *Squires*, 107 id. 593, 601; *People* v. *Allen*, 42 id. 378.) If the act of 1888 contemplated the taking of any waters by the state or of the land under the water, which belonged to the plaintiff, then the act is still valid. Ample provision has been made for compensation within the meaning of section 7 of article 1 of the Constitution. (*Rexford* v. *Knight*, 11 N. Y. 313; *S. M. Co.* v. *State*, 104 id. 562; *Benedict* v. *State*, 120 id. 228; Laws of 1883, chap. 205, § 13.) So far as Bear race is concerned, the court found that the defendants, Sweet, Mongin & Cook, were the owners thereof. Therefore, they could and did waive any constitutional objection that the act of 1888 made no provision for compensation as to them; and the plaintiff here cannot raise that question. (*Town of Pierpont* v. *Loveless*, 72 N. Y. 211; *Sinclair* v. *Jackson*, 8 Cow. 543, 579; *Baker* v. *Braman*, 6 Hill, 47; *In re Mayor, etc.*, 99 N. Y. 509.) As against this plaintiff, therefore, it cannot be said that either Sweet, Mongin & Cook, or the superintendent of public works had done anything or proposed to do anything with the waters of the Seneca river which could be held to be an unreasonable use thereof, or which was in violation of any right of the plaintiff in any view of the case. (*Gould* v. *B. D. Co.*, 13 Grey, 443; *Clin-*

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ton v. *Myers*, 46 N. Y. 511; *Bullard* v. *S. V. M. Co.*, 77 id. 525; *Head* v. *A. M. Co.*, 113 U. S. 19; *T. Co.* v. *Chicago*, 99 id. 641; *Atwater* v. *Trustees, etc.*, 124 N. Y. 609; *People* v. *Tibbetts*, 19 id. 523; *People* v. *Canal Appraisers*, 33 id. 486; *People* v. *N. Y. & S. I. F. Co.*, 68 id. 77.) If the plaintiff, by reason of the premises stated, has not or cannot suffer any actual damages by reason of the action of the defendants, and there is no finding of the court in this regard or to that effect, then of course, it is immaterial, so far as the plaintiff is concerned, whether the act of 1888 is unconstitutional or not. It has no special call to bring this suit. (*Thompson* v. *Comrs., etc.*, 2 Abb. Pr. 250; *People* v. *Canal Board*, 55 N. Y. 390; *Lord* v. *Thomas*, 64 id. 107; *Morgan* v. *Binghampton*, 102 id. 500; *Atwater* v. *Trustees, etc.*, 124 id. 609.) The conclusion of law that the plaintiff is entitled to all the surplus water which ran through the canal before the commencement of the enlargement of Bear race, not necessarily required for the purposes of navigation on the canal, is contrary to the settled law of this state. (*Burbank* v. *Fay*, 65 N. Y. 58.) An action of this kind is virtually an indirect action against the state, which cannot be maintained except by some statutory authority, submitting the state to the jurisdiction of the court. (*Lewis* v. *State*, 96 N. Y. 71; *People* v. *Dennison*, 84 id. 271; *Carr* v. *United States*, 98 U. S. 433; *Cunningham* v. *M. & B. R. Co.*, 109 id. 446.) In construing the act of 1888, the rule, "only when required by the most cogent reasons, nor indeed unless compelled by unanswerable grounds will a court declare a statute to be unconstitutional," is applicable. (*People* v. *Budd*, 117 N. Y. 13.)

Charles A. Hawley for appellants Sweet, Mongin & Cook. The judgment ought not to have been granted against the superintendent of public works. (*Mississippi* v. *Jackson*, 4 Wall. 475; *Gaines* v. *Thomas*, 7 id. 347; *Litchfield* v. *Register*, 9 id. 575; *Walker* v. *Smith*, 21 How. [U. S.] 579; *Thomas* v. *Com. of Canal Fund*, 5 Abb. Pr. 248; *Hartwell* v. *Armstrong*, 19 Barb. 166; *Lord* v. *Thomas*, 64 N. Y. 197.) The

improvement provided for by the act of 1888 is for public use. (Mills on Em. Domain, §§ 10, 11; Angell on Watercourses [7th ed.], 466; 16 Gray, 417; *Clark* v. *Blackmore*, 47 N. Y. 150; *Beekman* v. *S. S. R. T. Co.*, 3 Paige, 45; *Harris* v. *Thomas*, 9 Barb. 359; *Black* v. *M. R. R. Co.*, 18 Wend. 9; *B. & N. Y. R. R. Co.* v. *Barnard*, 9 N. Y. 595; *Ex parte Townsend*, 39 id. 171; *In re Fowler*, 53 id. 60.) The act of 1888 was not a local act. (*People* v. *N. P. R. Co.*, 86 N. Y. 7.) The exception to receiving in evidence the certified copies of the Assembly Journal and of the Senate Journal was well taken. (Code Civ. Pro. § 933.)

Frederick L. Manning for respondent. Certified copies of the Assembly Journal and Senate Journal, showing that the act did not receive a vote of two-thirds of the members of either house of the legislature, were properly received in evidence. (Code Civ. Pro. § 933; Laws of 1888, chap. 325.) The plaintiff is entitled to all the surplus water which ran through the canal before the commencement of the enlargement of Bear race, not necessarily required for the purposes of navigation on the canal. (*S. M. Co.* v. *People*, 104 N. Y. 562.) Chapter 325 of the Laws of 1888, which appropriated certain moneys for the improvement of Bear race, is a local act, and not having received a two-thirds vote of each house of the legislature, it is not constitutionally passed and is void. (Const. art. 1, § 9; *People* v. *Allen*, 42 N. Y. 378; *Prentice* v. *Weston*, 47 Hun, 21; *People ex rel.* v. *Comrs.*, 54 N. Y. 276.) The effect of said act is to take the property of plaintiff for a private purpose, and for that reason also said act is unconstitutional and void. (*Corning* v. *T. N. Factory*, 39 Barb. 311; *Holsman* v. *B. S. B. Co.*, 1 McC. 335; *Mager* v. *Chadwick*, 11 Ad. & El. 571; *Ricard* v. *Williams*, 7 Wheat. 59; *Bowman* v. *Wather*, 1 How. Pr. 189; *White* v. *Chapin*, 12 Allen, 511, 520; *Hammond* v. *Zehner*, 21 N. Y. 118; *Cochrane* v. *Van Surlay*, 20 Wend. 365; *Powers* v. *Berger*, 6 N. Y. 358; *Taylor* v. *Porter*, 4 Hill, 140.) The court had jurisdiction to restrain the superintendent of public works from proceeding

under said act. (High on Inj. § 309; *In re N. F. R. R. Co.*, 108 N. Y. 375; *R. & S. Co.* v. *Davis*, 43 id. 137; *Tyler* v. *Beacher*, 44 Vt. 648; *Allen* v. *Jay*, 60 Me. 124; *Taylor* v. *Porter*, 4 Hill, 147; *Hay* v. *Cohoes Co.*, 3 Barb. 47; *Wilkinson* v. *Leland*, 2 Pet. 658; *Varick* v. *Smith*, 5 Paige, 159; *Beekman* v. *Saratoga, etc.*, 3 id. 46; *In re N. Y. C. R. R. Co.*, 66 N. Y. 407; *M. F. Co.* v. *Mayor, etc.*, 4 Cald. 424; *W. R. B. Co.* v. *Dick*, 6 How. Pr. 547; *Clark* v. *White*, 2 Swan, 549; *Gilmer* v. *Lime Point*, 18 Cal. 229.)

O'BRIEN, J. The defendant James Shanahan, as superintendent of public works, in behalf of the state, entered into a contract with the defendants Fuller and Albaugh, for the performance of certain work in dredging and otherwise improving the channel of Seneca river and old Bear race, at Waterloo. The contractors had entered upon the work when this action was commenced, and both they and the superintendent of public works, were enjoined from proceeding therewith. And by the final judgment in the action this injunction against them, and all persons acting under them, is made perpetual. This appeal involves an examination of the reasons and grounds upon which the operations of the state, acting through one of its officers, and in pursuance of legislative direction, have been arrested at the suit of the plaintiff. The judgment in this case decides that the improvement is not authorized by law and that the consummation of the work contemplated will injuriously affect certain property rights of the plaintiff. It is necessary, at the outset, to get as clear an idea as possible in regard to the nature, origin and extent of these rights in order to get a more comprehensive view of the questions involved in the controversy.

The plaintiff is a domestic manufacturing corporation engaged in the manufacture of woolen goods on an extensive scale at Waterloo, deriving the power for the operation of its machinery from the waters of Seneca river. It was incorporated in the year 1836, but the water-right and privileges which it owns and which it is claimed are to be affected by the

acts of the defendants, existed long prior to that date. In the year 1802 the state conveyed, by letters-patent, 640 acres of land to John McKinstry on the north shore of the Seneca river, where is now the site of the present village of Waterloo. In December, 1807, he conveyed the land to one Elisha Williams, who erected one or more mills on the site now occupied by the plaintiff's factories, adjoining or near the river. The motive power for these mills was furnished by a race or canal constructed by Williams from the river, on the north side and near the upper end of what is now Big island, which divides the flow of the water of the river, the main current being south of the island and on the opposite side from the race. The mills, so erected by Williams, were in operation in the year 1813 when the legislature, by special act, incorporated the Seneca Lock Navigation Company. (Laws 1813, chap. 144.) This company under the power conferred upon it by law, took the canal or race constructed by Williams as a part of its canal, reserving to him, however, the right to draw water from the canal for the use of the mills not necessary for navigation purposes. The navigation company, in the prosecution of its business, used the river as a highway except around the rapid places, where it constructed a canal and locks for the passage of its boats, and the mill-race, dug by Williams, was utilized for this purpose. While the company carried on its operations the situation was this: It had the right to the use of the race which was made forty feet wide and between three and four feet deep, supplied with water from the river for the passage of its boats, and Williams and his grantees were entitled to all the surplus water from the canal or race for the use of their mills. The respective rights of the corporation and the grantees of Williams to the use of the water flowing through the race, thus converted into a canal for public use are regulated and defined by the statute, under which authority was given to acquire the race, and by a recent decision of this court. (*Silsby Mfg. Co.* v. *State*, 104 N. Y. 562.)

With the rights of the parties thus vested and defined, the legislature in the year 1825 authorized the construction of the

Cayuga and Seneca canal by the state, and for that purpose authorized the purchase of all the rights and privileges of the navigation company. (Laws 1825, chap. 271.) The state, under this statute and the proceedings thereunder, acquired such rights to the use of the water as the corporation to which it succeeded then had and no more, and Williams and his grantees still retained the right to the use of the surplus water then flowing through the canal from the river and no more. (*Silsby Mfg. Co.* v. *State, supra.*)

Subsequently the state found it necessary to enlarge the capacity of the canal which occupied the old mill-race, by making it deeper and wider. The last improvement in this respect was authorized and executed under chapter 479 of the Laws of 1857. This enlargement resulted in a canal seventy feet wide and a minimum depth of seven feet with a maximum depth of nine feet, in place of the original race, and consequently a greatly increased quantity of water was diverted from the channel of the river into the canal. The plaintiff having succeeded, through mesne conveyances, to all the rights of Williams, has enjoyed the benefit of the increased body of water thus supplied by the state in the additional power which it furnished for the operation of machinery, and the advantage thus gained, it now claims as a property right, which it seeks to retain and protect in this action. It has not been found by the court below, nor is it alleged in the complaint, that any right which the plaintiff's grantors had or enjoyed during the occupation of the race as a canal by the navigation company is threatened or will be injuriously affected by any act of the defendants. But it is alleged and found that since 1857, the plaintiff has used and enjoyed the water-power for its factories, as enlarged and increased by the improvement of the canal, made by the state in that and previous years, with the acquiescence of the authorities of the state having charge of the care and management of the canals, and that such use and enjoyment has ripened by the lapse of time into a property right which is threatened and will be seriously impaired if the contract made by the defendants with the state, is carried out.

Opinion of the Court, per O'BRIEN, J.

Thus far our attention has been directed to the origin, nature and extent of the property rights on the north side of the river, as developed since the grant from the state in the beginning of the present century. In order to appreciate and understand the motive which probably inspired or stimulated the legislation which must be hereafter considered, and which is the real point of contention between the parties, it is necessary to notice other and what, perhaps, might be called rival interests and rights which, during the same period, were developed on the south or opposite side of the river, and which must have been materially affected by the operations of the state and of the corporation, the rights of which the state acquired on the other shore of the stream.

About the year 1798, one Samuel Bear settled on lands on the south shore, now the site of South Waterloo, or that part of the village which is south of the river. The Seneca river flows from the outlet of Seneca lake, at the village of Geneva, easterly through the villages of Waterloo and Seneca Falls, and finally empties into the Oswego river. It divides the village of Waterloo, one ward being south of the river and the other north. In the year 1804, the state conveyed one hundred acres to Bear, lying along and south of the river, with the water-power and privileges connected therewith. He also dug a race and erected a mill on his land. The use by Bear of the water of the river for manufacturing purposes, on the south side through this race, probably antedated a similar use by Williams on the other side, though this fact is not found and in our view is not very material. It is the channel known in the case as Bear race, and entered the river near the easterly end of Big island and a considerable distance easterly or below the point where Williams tapped the river with his race on the opposite side. The defendants Sweet, Mongin & Cook are the owners of this race, water-power and mill, having derived title thereto through mesne conveyances from Bear. The channel of the river was originally along and near the south shore, so that when Bear built his mill, the facilities for obtaining a proper supply of water were appar-

ently as good on his side of the river as on the other. But, subsequently, as we have seen, the navigation company and later the state itself diverted the water at a point above into the canal on the north shore, and the plaintiff's mills, using the surplus, must have had a better supply than the mills on the other side. In fact the plaintiff has succeeded in this case in the courts below, on the ground that the power of the legislature to appropriate money has been used for the purpose of securing to certain mills on the south side of the river a greater supply of water, which must necessarily diminish the surplus from the canal, and thus take property from the plaintiff for the use of persons on the opposite side of the river.

This view of the situation and this conflict of private interests will enable us to consider the legislation which the plaintiff has thus far successfully assailed.

By chapter 113 of the Laws of 1887 the superintendent of public works was authorized to expend fifteen thousand dollars, or so much thereof as might be necessary, in necessary improvements on locks number one and two on the Cayuga and Seneca canal, and to remove obstructions and debris between Seneca lake outlet and the upper dam at Waterloo. The money thus appropriated, for some reason not now important to ascertain, was not expended, but remained in the state treasury, and at the next session of the legislature chapter 325 of the Laws of 1888 disposed of it and authorized its expenditure in language somewhat different from that used in the statute passed the year before, as follows:

"An act to provide for the dredging and excavating the channel of Seneca river and the old Bear race in the village of Waterloo to facilitate the passage of canal boats.

"Approved by the Governor May 18, 1888. Passed, three-fifths being present.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. The superintendent of public works is hereby authorized in his discretion to expend the fifteen thousand dollars, or so much thereof as may be necessary, which was

appropriated by chapter one hundred and thirteen of the Laws of eighteen hundred and eighty-seven and directed therein to be applied to improvements on the Cayuga and Seneca canal, toward dredging and excavating the channel of Seneca river, from its intersection with said canal in the village of Waterloo and the old Bear race, and thence toward dredging and excavating said race to Washington street in said village, so as to admit the passage of canal boats therein from said canal.

"§ 2. This act shall take effect immediately."

Pursuant to the authority thus given, the defendant Shanahan, as superintendent of public works, advertised, as required by law, for proposals to perform the work contemplated by the legislature in the passage of the act. This resulted in a contract with the state for the performance of the work by the defendants Fuller and Albaugh, in conformity with a map and plans prepared by the state engineer. After entering upon the performance of the contract they were enjoined by order granted in this action, and Sweet, Mongin & Cook, the parties who own Bear race, were also made parties to the action upon the ground that they were to be the real beneficiaries of the improvement, although there is no allegation that they had done or threatened any act in furtherance of the work.

On the trial of the action at Special Term the court found the following facts in addition to those already stated: That the Seneca river is a navigable public highway, and that its channel is south of Big island; that Bear race was private property, and that neither it nor the channel of the river to its intersection with the canal where the dredging was to be done and the improvement made were any part of the canal system; that the race was about twenty feet wide and three and a half feet deep, and that, by the improvement, it was to be made wider and deeper; that the plaintiff is entitled to all the surplus water that runs through the canal; that chapter 325 of the Laws of 1888 did not receive the assent of two-thirds of the members of either house of the legislature, and is void; that it appropriated public money for a local or private purpose, and that its effect was to take the plaintiff's

property for private use, and was, therefore, in conflict with the Constitution, and, being thus invalid, it furnished no authority or protection to the superintendent or the contractors in deepening the channel of the river and the race, and in this way diverting the waters of the river from the canal. Judgment was directed perpetually restraining them from further prosecution of the work, and it has been affirmed by the General Term.

The case, therefore, involves, among other questions, the validity of an act of the legislature, always important. The court has said upon a recent occasion that "only when required by the most cogent reasons, nor, indeed, unless compelled by unanswerable grounds will an act of the legislature be declared void." (*People* v. *Budd*, 117 N. Y. 13.)

Before proceeding to examine the grounds upon which a statute has been held void, in this case it may be well to observe that there can be no dispute as to the power of the legislature to take private property for other than a public use without the consent of the owner. That, of course, cannot be done, either with or without compensation. Nor can it be denied that, generally, whether the use to which private property may be devoted by legislative power is in fact public or private, is a judicial question, and the courts are not concluded by any declaration of the law-making power as to the nature of the use. (*Matter of Niagara Falls & Whirlpool R. Co.*, 108 N. Y. 375; *Matter Deansville Cemetery Association*, 66 id. 569.)

So, too, it has been held that a legislative act, ostensibly for the protection of the public health, but which deprives the citizen of liberty or property, may be subjected to judicial scrutiny for the purpose of ascertaining whether its provisions really relate to and are in fact convenient and appropriate to promote the public health. The determination of the legislature on this point is not final or conclusive. (*Matter of Jacobs*, 98 N. Y. 98.)

It may also be regarded as settled that when the legislature appropriates public money for some improvement, the courts

may inquire whether the improvement is for a purpose which is public, or one merely private or local, and whether the bill, if the purpose was private or local, received the assent of two-thirds of the members of each house of the legislature, as required by the Constitution. (*People* v. *Allen*, 42 N. Y. 378; *People ex rel.* v. *Commissioners of Marlborough*, 54 id. 276.) But the scrutiny which the courts have exercised in regard to legislation of this character has been confined to matters appearing on the face of the bill itself, and to things that are the subject of judicial notice. In this case the act has been held void as an appropriation of public money for a local or private purpose, not receiving the assent of two-thirds of the members of each house. The private or local character of the expenditure does not appear on the face of the bill, but the trial court, against the defendant's objection and exception, instituted an inquiry in regard to the purpose of the appropriation upon the testimony of witnesses, and having found as matter of fact from this testimony that the improvement could not benefit the canal, but would benefit the property of individuals, the conclusion was reached in this way that the purpose of the appropriation was not public, but private or local. Reading the title and the provisions contained in the body of the act, it provides for an expenditure of fifteen thousand dollars for the purpose of dredging and excavating the channel of a navigable river and a private race intersecting the canal, so as to facilitate the passage of canal boats therein, from the canal. The purpose thus expressed is not private or local, but public, inasmuch as the general improvement of the public highways of the state, whether canals or rivers that are navigable, is for the benefit of the state at large, though some locality or some individuals may be benefited more than others. The expenditure may in fact be improvident and the work may prove to be useless to the public, but the legislature, as the depository of the sovereign powers of the people, must necessarily be the judge of the propriety and utility of making it. If it were otherwise, every appropriation of money by the legislature could be assailed in the courts, at the suit of private individuals,

on the ground that they are useless and intended for a purpose other than is plainly expressed, in order to evade some provision of the organic law. The judicial department cannot institute an inquiry concerning the motives and purposes of the legislature, in order to attribute to it a design contrary to that clearly expressed or fairly implied in the bill, without disturbing or impairing in some measure the powers and functions assigned by the Constitution to each department of the government. The courts cannot determine, upon the testimony of witnesses, that the purpose of the legislature was to appropriate public money for the benefit of an individual, when it has expressed its purpose in the bill itself to be the enlargement or improvement of the canal. They must assume that the legislature acted in good faith and meant just what it said, though it may be possible to show, outside of the language and terms of the bill, that in fact all, or the larger part, of the benefits following the expenditure may or will be reaped by a few individuals. The question always is, with respect to such bills, how is the purpose of the legislature to be ascertained? Must that be determined from the bill itself and from such considerations as the court can judicially notice, or is it competent to take proof and determine it as a matter of fact, as was done in this case? Reason and authority, as well as the fitness of things, demand that when an act of the legislature appropriating money is assailed upon the ground that the purpose of such appropriation is local or private and not public, the question shall be determined by the language and general scope of the act. This principle was stated with great force and clearness by Judge DENIO in *People* v. *Draper* (15 N. Y. 545): "If a particular act of legislation does not conflict with any of the limitations or restraints which have been referred to, it is not in the power of the courts to arrest its execution, however unwise its provisions may be, or whatever the motives may have been which led to its enactment. There is room for much bad legislation and misgovernment within the pale of the Constitution, but whenever this happens, the remedy which the Constitution provides, by the opportunity for frequent

renewals of the legislative bodies, is far more efficacious than any which can be afforded by the judiciary. The courts cannot impute to the legislature any other than public motives for their acts. If a given act of legislation is not forbidden by express words, or by necessary implication, the judges cannot listen to a suggestion that the professed motives for passing it are not the real ones. If the act can be upheld upon any views of necessity or public expediency which the legislature may have entertained, the law cannot be challenged in the courts." The power of the courts to overthrow legislative acts by independent inquiries as to facts, outside of the provisions of the statute itself, has been considered and denied in more recent cases. (*People ex rel.* v. *Albertson*, 55 N. Y. 50, 54; *Matter of N. Y. E. R. R. Co.*, 70 id. 327; *People ex rel. Kemmler* v. *Durston*, 119 id. 569; *Amy* v. *Watertown*, 130 U. S. 319.)

But, even upon the theory adopted by the courts below and upon the facts developed at the trial and found in the record, it is by no means clear that the act is invalid under section 9 of article 1 of the Constitution, which requires a two-thirds vote for the appropriation of money for a local or private purpose. The state had diverted the waters of the river into the canal and to that extent deprived the riparian owners below on the south side of its use. Assuming that the purpose of the act was, as claimed, to restore a portion of the water thus diverted to its original channel and to the use of the owners who had been deprived of it by the act and authority of the state, who can say that an expenditure for that purpose is private or local within the meaning of the Constitution? If the state, in carrying out a policy of justice through its legislature, appropriates money to pay a debt or to repair an injury inflicted upon an individual or a locality, obligatory upon it in honor and justice, that is but a part of its legitimate functions and duties as a sovereign and the purpose in such case would seem to be public. (*Morris* v. *People*, 3 Denio, 399.)

So that, whether the statute is tested by reference to its language alone or by a consideration of the facts established, it

was legally enacted. Moreover it should also be observed that the complaint contains no allegation that the statute was not constitutionally enacted, or that it did not receive the requisite vote or that it is private or local, and the evidence upon which these facts were found and the finding itself were excepted to. It has been held that when the objection to the validity of a law arises out of the failure of the legislature to comply with the procedure pointed out by the provisions of the Constitution, which is not apparent upon the face of the act itself, the facts must be distinctly pleaded. (*People ex rel.* v. *Supervisors of Chenango*, 8 N. Y. 317; *Thomas* v. *Dakon*, 22 Wend. 9; *Hunt* v. *Van Alstyne*, 25 id. 608.)

But as this point was not specifically raised at the trial and is not discussed upon the briefs of counsel, we prefer to put our decision on other grounds. The courts below have also held that the act is invalid because its effect is to take the plaintiff's property for private purposes. This proposition is based solely upon the fact that the improvement, by deepening the channel of the river and enlarging the race, will divert water from the canal and restore it to the channel of the river, the use of which the plaintiff has enjoyed without question for more than twenty years. The use by the plaintiff of the surplus water beyond what it was entitled to during the occupation of the canal by the navigation company, however long continued, and whether adverse or by permission, could not impair the rights of the state. (*Burbank* v. *Fay*, 65 N. Y. 57.)

The state was at liberty to withdraw the surplus, so far as it came from the enlargement of the canals of 1857 and prior thereto, so long as the plaintiff could use the quantity of water secured to its grantors by the law under which the navigation company acquired the race. It is not claimed that this right was threatened or could be impaired by the improvement. The state could restore water which it diverted from the natural channel without furnishing the plaintiff with any legal ground of complaint, even though it was for the purpose of delivering it to the defendants or any other riparian owner on the south side. So long as the legal rights of the plaintiff, as

between it and the state are respected, it cannot complain if the state is doing something with its own property that may possibly benefit others. If the state has the right to diminish the supply of water in the canal at all, and that right is not denied, then the motives that may underlie the act are not material. The reasons that move the public authorities do not concern the plaintiff. So we conclude that the plaintiff has no property right in the use of the surplus water in the canal, as increased by the enlargement made by the state from 1840 to 1857, that can be impaired by the execution of the work contemplated by the statute. But if the plaintiff could establish any right to the use of the increased supply of water furnished by the state in the process of enlarging the canal from time to time, the most that the plaintiff could then claim would be that the improvement would result in a consequential injury which might form the basis for a claim for damages or compensation before the tribunal which the state has authorized to hear and determine such claims. It would furnish no ground for arresting the work of improving or enlarging the canal in such manner as the legislature might determine to be for the public good. (*Atwater* v. *Trustees, etc.*, 124 N. Y. 602; *Silsby Mfg. Co.* v. *State, supra*; *Rexford* v. *Knight*, 11 N. Y. 313; Laws 1883, chap. 205, § 13.)

The execution of the work, authorized by the statute, by the the superintendent of public works, or the contractor acting under his authority, does not involve the taking of any of the plaintiff's property for any purpose, public or private.

But Bear race, from its intersection with the river to Washington street, which the act also provides for dredging and excavating, is the private property of the defendants Sweet, Mongin & Cook. If that has been or is to be taken, within the meaning of the Constitution, that is a question which the owners alone can raise. It does not in any legal sense concern the plaintiff, if the defendants see fit to renounce a constitutional provision, intended for their own benefit. (*Town of Pierrepont* v. *Loveless*, 72 N. Y. 211; *Baker* v. *Braman*, 6 Hill, 47; *Matter of Mayor, etc.*, 99 N. Y. 569, 584.)

The expenditure of public money for the purpose, in part at least, of enlarging a private mill-race, furnishes the basis for the argument, in behalf of the plaintiff, to show that the appropriation is for a private or local purpose. But we have no right to assume, as this argument does, that the state will never acquire the title to the race or the right to its use for the purposes of navigation. The title, or the right to its use, can be acquired at any time and need not be obtained in advance. Property required by the state for canal purposes always has been and may still be taken in a summary way, without the aid of any judicial proceeding. The constitutional provision requiring the compensation to be made to the owner, to be ascertained by a jury, or by commissioners appointed by the court does not apply to such a case. (Const. art. 1, § 7.) The state may take possession, go on with its work and await the claim of the owner for compensation. (*Marks* v. *State*, 97 N. Y. 572; *Heacock* v. *State*, 105 id. 246; *Stewart* v. *State*, Id. 254; *Benedict* v. *State*, 120 id. 228.)

In this view we have no right to say that when the authorities of the state were restrained, they were not proceeding, in good faith, to make an improvement to the canal system. Moreover it must be noted here that by chapters 461 and 493 of the Laws of 1889 the legislature reappropriated the money for this very improvement, increasing the amount, and providing for a release to the state of Bear race by the owners for canal purposes. We have already considered the argument of plaintiff's counsel, which, apparently, was successful in the courts below, that the real purpose of the appropriation was to furnish additional power to defendants' mill which is located at the easterly end of Bear race; and while we consider that this point is sufficiently answered by the remark of ALLEN, J. in *People* v. *Albertson* (*supra*), that "no motive, purpose or intent can be imputed to the legislature, in the enactment of a law other than such as are apparent upon the face and to be gathered from the terms of the law itself," yet there is an additional fact which deserves some notice. The act authorizes no work to be done in Bear race farther east than Wash-

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ington street and this would not reach the defendants' mill as it is located on the other or easterly side of that street. The additional flow of water, which would result from deepening and widening the race, cannot be utilized by the defendants until the work is carried still further east and the machinery in the mill is changed in order to permit the use of more power. It is not found or alleged that such a change is contemplated or threatened. In this view it is difficult, upon any theory of the case, to say that the state has any other purpose in view than that expressed on the face of the act, namely: to enlarge the channel of the river and the race, in order to permit navigation, by boats, from the canal to a public street, on the south side of the river.

The judgment of the General and Special Terms should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

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128 364
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128 364
135 167

MARY BIRCH REID, Respondent, *v.* THE BOARD OF SUPERVISORS OF ALBANY COUNTY, Appellant.

Under the provisions of the act providing "for the assessment and collection of taxes in the city of Albany" (§ 52, chap. 86, Laws of 1850), which, in case a purchaser at a tax sale shall be unable to recover possession of the real estate because of error or irregularity in the proceedings for the levying or collection, requires the board of supervisors of the county to reimburse the purchase-money, and upon the refusal or neglect to do so, authorizes the recovery of the money in an action against the board, when, in consequence of some defect in the proceeding, a sale is invalid, and because thereof the purchaser is unable to recover possession, he is at once entitled to reimbursement and his cause of action is barred, if suit is not brought in six years from the time when the right to make a demand for reimbursement was complete. (Code Civ. Pro. § 410.)

In an action under said provision to recover back the purchase-money paid on various tax sales, all of which were made in and prior to 1883, and more than seven years before the commencement of the action, it was not alleged in the complaint or shown upon the trial that any legal proceeding had been instituted by the purchaser or his successor in interest to recover possession of the land, or that he made any effort to obtain possession, but it was admitted that by a decision of this court (*Remsen*

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v. *Wheeler*, 105 N. Y. 573), rendered four years after the sale in an action between other parties, sales under similar proceedings in another locality were adjudged illegal and void. The court below decided that neither the purchaser nor plaintiff, his successor in interest, was entitled to bring an action for reimbursement until such decision, and so that the action was not barred by the statute. *Held*, error; that the decision had no effect upon and in no way changed the rights, duties or obligations of the parties here, but was simply an authority as to the law.

It seems said provision requires that before a recovery can be had in such an action plantiff must show an effort on the part of the purchaser to obtain possession under the tax sale, and that he was unable to do so because of its invalidity; it is not sufficient to show merely that the sale was illegal.

It seems, however, the purchaser is not bound to bring an action or to institute a proceeding, such as is authorized by the act (§ 48); if he demand possession of the occupant or owner, and this is refused on the ground of invalidity of the sale, he then may make his demand for reimbursement; in which case, however, he assumes the burden of establishing the invalidity of the sale.

It seems, also, that the purchaser must act within a reasonable time after he obtains his certificate; that in case he institutes legal proceedings and conducts them to a determination with reasonable diligence, the statute will begin to run from such termination; and that if he relies upon a demand of possession, and this is shown to have been made within a reasonable time, the statute will begin to run from that time.

It seems, also, that the question as to what is a reasonable time, is one of law.

The amendment of said provision made by the act of 1889 (Chap. 429, Laws of 1889), which requires the reimbursement to be made "within six years from such sale," is prospective in its character, and so has no effect upon prior sales; said amendment did not repeal the limitations of the Code of Civil Procedure, but left them to apply to the past and simply made a new rule for future cases.

It seems, also, that the legislature might have made the amendment retroactive in its character, provided a reasonable time was given to the purchaser to claim and enforce reimbursement after the amendment took effect

Reid v. *Suprs.*, *etc.* (60 Hun, 215), reversed.

(Argued June 23, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 21, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

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William Reid became the purchaser at tax sales in the city of Albany of certain lands sold for the non-payment of taxes thereon, under the act, chapter 86 of the Laws of 1850, and he received the certificates of such sales and the deeds of the lands sold as provided in that act. The sales were made and the moneys paid by him between June, 1875, and June, 1883, both inclusive. The plaintiff has succeeded to the rights of Reid and commenced this action September 2, 1890, to recover with interest the moneys paid by Reid upon such sales. The defense was the Statute of Limitations, which was overruled by the trial judge, who gave judgment to the plaintiff for the amount claimed.

Other facts appear in the opinion.

Andrew Hamilton for appellant. There is no liability at common law, and the rule of *caveat emptor* is strictly applied to a purchaser at a tax sale. (Laws of 1850, chap. 86, § 52; *De Grauw* v. *Supervisors*, 13 Hun, 381; Cooley on Taxn. 329, 375, 572; Desty on Taxn. 850; *Lynde* v. *Melrose*, 10 Allen, 47; *Packard* v. *Limerick*, 34 Me. 269; *Coffin* v. *City of Brooklyn*, 116 N. Y. 166; *Brevoort* v. *City of Brooklyn*, 39 id. 120, 135; *Van Honk* v. *Whitbeck*, 3 Paige, 409.) Under the amendment thereto the board of supervisors had no authority to make the reimbursement. It would have been an illegal act for them to do, and no action will lie for their refusal to do it. (Laws of 1889, chap. 429.) If it should be held that the cause of action was not taken away by virtue of chapter 429, Laws of 1889, then the defendants contend that the cause of action is barred by the Statute of Limitations. (Code Civ. Pro. §§ 380, 382, 410; Laws of 1850, chap. 86, §§ 48, 52.) The plaintiff's claim being thus barred by the statute, it was not only the right of the supervisors, but their duty, to reject it, and to refuse to make the reimbursement. They have only authority to allow legal claims, and one barred by the Statute of Limitations is not a legal one. (*Rodgers* v. *Rodgers*, 3 Wend. 503; *In re Carr*, 5 Redf. 69, 74; *Supervisors* v. *Ellis*, 59 N. Y. 620; *Hull* v. *Supervisors*, 19 Johns.

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259; 6 Abb. [N. C.] 398.) The trial court erroneously found, as matter of fact, "that, as a result of a decision of the Court of Appeals of this state in a similar case, the said tax sales were declared irregular and void on or about June 7, 1887." And as a conclusion of law, "that neither said Reid nor the plaintiff were entitled to demand the reimbursement of the moneys so paid out * * * for such certificates until the year 1887, and after such certificates had been declared irregular and void by the court, as hereinbefore found." (*Parsons* v. *Rochester*, 43 Hun, 258; *Van Nest* v. *Mayor, etc.*, 24 Wkly. Dig. 50; *Dickinson* v. *Mayor., etc.*, 92 N. Y. 584; *White* v. *City of Brooklyn*, 122 id. 55; 89 id. 128; *Sauerville* v. *Hamilton*, 4 Wheat. 230; 2 Greenl. on Ev. 431; *Taylor* v. *Spears*, 6 Ark. 381; Abbott's Trial Ev. 822.) Even though the plaintiff were entitled to reimbursement of the purchase-money, she was not entitled to interest allowed, as we requested the court to find, and to whose refusal we duly excepted. (122 N. Y. 64.)

D. Cady Herrick for respondent. None of the general Statutes of Limitations bar the claim or cause of action. (*De Graw* v. *Bd. Supvrs.*, 13 Hun, 381; *People* v. *Ingersoll*, 58 N. Y. 33; Laws of 1850, chap. 86, § 52.) The remedy or right of action given by the act of 1850 was not extinguished by the act of 1889. (*Gibbs* v. *Ins. Co.*, 63 N. Y. 121; *Goilotel* v. *Mayor, etc.*, 87 id. 445; *In re Miller*, 110 id. 223; *Ely* v. *Holton*, 15 id. 595; *Moore* v. *Mausert*, 49 id. 332; *People* v. *Supvrs.*, 67 id. 117.) Plaintiff's claim is not barred by the Statute of Limitations created by chapter 429 of the Laws of 1889. (*Sayre* v. *Wisner*, 8 Wend. 661; *Richardson* v. *Cook*, 37 Vt. 599.) To give the construction contended for by defendants would be to give it a retrospective operation, which is contrary to the policy of the law. (*People* v. *O'Brien*, 111 N. Y. 60; *Sanford* v. *Bennett*, 24 id. 20; *People* v. *Supvrs.*, 43 id. 130–135; *Beecher* v. *F. R. R. Co.*, 131 Mass. 156; *Fitzpatrick* v. *Boylan*, 57 N. Y. 433.) Nothing in the wording of the act of 1889 indicates that the legislature

intended it should have a retrospective operation; neither is there any necessary implication to that effect. (*Harvey* v. *Tyler*, 2 Wall. 347; *Seamans* v. *Corter*, 15 Wis. 548; *Beecher* v. *F. P. R. Co.*, 131 Mass. 156; *Benton* v. *Wickwire*, 54 N. Y. 229.) A construction that would apply the statute to sales made more than six years before its passage would work injustice, affect vested rights and impair the validity of contracts. (*Dash* v. *Van Kleeck*, 7 Johns. 477; *Watkens* v. *Haight*, 18 id. 138; *Sayre* v. *Wisner*, 8 Wend. 661; *Mongeon* v. *People*, 55 N. Y. 616; *Fitzpatrick* v. *Boylan*, 57 id. 437; *N. Y. & O. M. R. R. Co.* v. *Van Han*, Id. 477; *People* v. *Green*, 55 id. 295; *Price* v. *Hopkins*, 13 Mich. 318.) The true rule of construction is to apply to past transactions, but only from the time of the passage of the act, no part of the time that has elapsed prior to its passage counting as a part of the six years. (*Sohn* v. *Watterson*, 84 U. S. 596; *Brewster* v. *Brewster*, 32 Barb. 429; *McCahill* v. *Hamilton*, 20 Hun, 388; *Terry* v. *Anderson*, 95 U. S. 628.) Where there is a change in the Statute of Limitations the time that had run before the passage of the act is no part of the new limitation. (*Sohn* v. *Watterson*, 84 U. S. 596; *Sayre* v. *Wisner*, 8 Wend. 664; *Nickler* v. *Hoskins*, 15 Ala. 619; 50 Am. Dec. 154; *Cox* v. *Davies*, 17 Ala. 714; 52 Am. Dec. 199; *Davies* v. *Davies*, 7 How. Pr. 778.) Neither section 410 nor 415 of the Code of Civil Procedure affect the question. (*Dickinson* v. *Mayor, etc.*, 92 N. Y. 584; Code Civ. Pro. §§ 365, 368, 415; *Fisher* v. *Mayor, etc.*, 67 N. Y. 73; *White* v. *City of Brooklyn*, 122 id. 53.)

EARL, J. All the moneys claimed in this action were paid upon the tax sales more than seven years before the commencement of the action, and the only question for our determination is whether their recovery is barred by the Statute of Limitations.

Under section 48 of article 6 of chapter 86 of the Laws of 1850, the purchaser at tax sales conducted in the city of Albany, upon the payment by him of the amount of his bids,

was entitled to receive certificates of such sales, and then he was immediately entitled to possess, hold and enjoy the lands purchased for the full term mentioned in his certificates; and he was authorized to cause the occupants thereof to be removed therefrom, and the possession thereof delivered to him in the same manner and by the same proceedings, by and before the same officers, as in the case of a tenant holding over after the expiration of his term without permission of his landlord. Then it was provided in section 52 of the same article, excepting the words in italics, as follows: "Whenever any purchaser under such sales shall be unable to recover possession of the real estate sold to him, by reason of any error or irregularity in the assessment of any person or property, or in the levying of any tax, or in any proceedings for the collection of a tax, the board of supervisors of the said county shall *at any time within six years from such sale*, reimburse the purchase-money so paid, with interest; and upon their refusal or neglect to do so, the same may be recovered by an action against them, and shall be paid by the county treasurer, if he have moneys in his hands sufficient for the purpose, not otherwise specifically appropriated, upon a production of a certified copy of the judgment; and if he have no such moneys in his hands, then the same shall be added to the amount of the taxes to be levied on the city of Albany, and collected in the same manner as other contingent expenses, and when collected shall be paid over to such purchaser."

The section was amended by the act chapter 429 of the Laws of 1889, passed June eleventh of that year, by inserting therein the words in italics.

It was not alleged in the complaint and was not shown upon the trial that any legal proceedings of any kind had been instituted by the purchaser or the plaintiff to recover possession of the real estate. It does not even appear by allegations or proof that the purchaser or the plaintiff ever demanded or made any efforts of any kind to obtain such possession. The plaintiff's case rests upon the allegation contained in the complaint, and not denied in the answer, that the purchaser and the plaintiff

were unable to recover the possession of the real estate purchased by reason of errors and irregularities in the assessment and in the levying of the taxes, and in the proceeding for the collection thereof. The findings of the trial judge upon that branch of the plaintiff's case was based on that admitted allegation, and he found that the purchaser was entitled to demand possession of the real estate sold to him immediately upon the issuing to him of the certificates of the sales, and "that by reason of errors and irregularities in the proceedings prior to the said sales, the purchaser was unable to recover possession of the parcels sold at the times of such sales and immediately thereafter."

The trial judge made a finding of fact based upon an allegation in the complaint, not denied in the answer, "that as a result of a decision of the Court of Appeals of this state in a similar case, the said tax sales were declared irregular and void on or about January 7, 1887," and upon that finding of fact, he based a conclusion of law "that neither the said William Reid nor the plaintiff were entitled to demand of the defendants the reimbursement of the moneys so paid out on said tax sales and for such certificates and deeds above referred to, until the year 1887, and after such sales, certificates and deeds had been declared irregular and void by the court as hereinbefore found;" and he held that the Statute of Limitations did not begin to run until that date. The decision of the Court of Appeals referred to was made in the case of *Remsen* v. *Wheeler* (105 N. Y. 573), a case which arose in the city of Brooklyn and related exclusively to taxes imposed there.

That decision had nothing whatever to do with these parties or these sales. It did not conclude or bind these parties, and simply furnished evidence of the law. It was not even absolutely binding as a precedent in any other case. The Court of Appeals could disregard it as authority in any subsequent case if it believed it to be unsound. (*Saint Nicholas Bank* v. *State National Bank*, in this court June 2, 1891.)* These tax sales were not valid until that decision and then

**Ante*, page 26.

thereby rendered invalid. They were from the first invalid and the rights of the parties interested were in no way affected by that decision. The rights and the duty of the purchaser and the obligations of the defendant were precisely the same before that decision as after. Upon this point the following authorities have some bearing: *Allen* v. *Mille* (17 Wend. 202); *Parsons* v. *City of Rochester* (43 Hun, 258); *Van Nest* v. *Mayor, etc.* (24 Week. Dig. 50); *White* v. *City of Brooklyn* (122 N. Y. 53).

That decision can, therefore, have no bearing upon this case, except to show that these tax sales were invalid from the beginning.

The plaintiff's case stands then solely upon the ground that the tax sales being invalid, he obtained no title to the lands and could not have recovered the possession thereof in any legal proceedings instituted by him if they had been resisted. Upon this view of the case the purchaser was at once entitled to demand reimbursement from the defendant, and his cause of action was barred in six years from that time, under section 410 of the Code, which provides that "when a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete."

These views are sufficient for the reversal of this judgment. But upon a new trial other facts may appear, and hence it is quite proper that we should determine the construction and the force and effect of section 52, as found in the act of 1850.

Under that section, before the plaintiff can recover in this action, she must show that the purchaser made some efforts to obtain the possession of the lands. This is clearly implied in the language used. The purchaser must have been "unable to recover such property," and the inability could not be predicated of a case where no steps whatever had been taken to recover possession. It is not sufficient to show merely that the sales were illegal. The occupant might still not choose to

resist the right of the purchaser, and the obligation of the defendant to reimburse the purchaser only arises in case of the inability to recover possession for reasons particularly mentioned in the section. Good faith requires at least so much of the purchaser.

What efforts must the purchaser have used to recover the possession before he can claim reimbursement under the section? He may institute an action or the special proceeding mentioned in section 48 above referred to, and if he conducts the action or the special proceeding in good faith to a termination unsuccessfully on account of the invalidity of the sales, the result will show his inability to recover and his right to reimbursement. But he is not bound to institute an action or the special proceeding. He may go to the land and demand the possession from the occupant or owner, and if his right is denied and the possession is refused to him on the ground of the invalidity of the sales, then he may make his demand for reimbursement. But in such case he must assume the burden of establishing the invalidity of the sales, and his inability on that account to obtain the possession. It is not provided in the statute that his inability to recover the possession shall be established by legal proceedings, and it would be unreasonable to suppose that the legislature meant that he should institute fruitless legal proceedings against an owner or occupant insisting upon the invalidity of the sales, and thus subject himself to useless expense before he could reclaim the money for which he had received no value.

Within what time should the purchaser take the steps or make his effort to recover the possession? The statute of 1850 says nothing upon the subject. It could not have been the legislative intention that the purchaser could delay unreasonably and thus make the county practically an enforced borrower of his money at the lawful rate of interest during his will. The law provides in substance that he is to do something before he can claim reimbursement, and it is implied in such a case that he must act within a reasonable time. There can be no other rule. If he institutes legal proceedings he

must institute them within a reasonable time after he obtains his certificates and conduct them to a termination with reasonable diligence, and then the Statute of Limitations will begin to run from their termination, as his failure to recover is then established. If he relies upon a demand of possession, and does not institute legal proceedings, then the demand must have been made within a reasonable time, and the Statute of Limitations will begin to run from that time. What is a reasonable time in such a case is a question of law to be determined upon the circumstances of each case. Any other construction of the statute will enable the purchaser to defeat or nullify the Statute of Limitations by voluntarily postponing through his own negligence the time when he could make the demand for reimbursement. The Statute of Limitations begins to run from the time his right to demand reimbursement is complete, and as it depends upon his own act to perfect his right to make the demand he cannot unreasonably delay that act.

We have thus far considered section 52 as it was before the amendment of 1889. The amendment can have no effect in this case. If the plaintiff's claim was barred by the limitation prescribed in the Code when the amendment was enacted, then it certainly does not reach this case. The original section is applicable to all prior sales, and the amendment is prospective in its operation. The original section may be treated as if it was permitted to stand, and the amendment had been placed in a separate act applicable to future sales. (*Ely* v. *Holton*, 15 N. Y. 595; *Moore* v. *Mausert*, 49 id. 332; *Gibbs* v. *Queen Insurance Co.*, 63 id. 114, 121; *People* v. *Supervisors, etc.*, 67 id. 110, 117; *Goillotel* v. *Mayor, etc.*, 87 id. 445; *Matter of Miller*, 110 id. 216, 223.) The amendment did not repeal the Code limitations, but left them to apply to past cases and simply made a new rule to apply to future cases.

The legislature could, however, have made the amendment applicable to past sales, provided a reasonable time was given for the purchaser to claim and enforce reimbursement after the amendment took effect. (Cooley's Const. Lim. [4th ed.]

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456; *Bigelow* v. *Bemis*, 2 Allen, 496; *Terry* v. *Anderson*, 95 U. S. 628.)

Our conclusion, therefore, is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except PECKHAM, J., not sitting.

Judgment reversed.

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128 374 3/
187 408

PETER GARLOCK, as Executor, etc., Appellant, *v.* ELLA VANDEVORT et al., Respondents.

A surrogate, in a proceeding before him having for its object the settlement of an executor's accounts and the obtaining of a decree directing the distribution of the fund in his hands, when all the parties in interest are present, has authority to construe the provisions of the will and determine their meaning and validity, whenever necessary in order to make his decree as to distribution.

Such jurisdiction is incidental to the office and flows from the authority conferred upon the surrogate by the statute (Code Civ. Pro. § 2472), and is equal to and concurrent with the jurisdiction of the Supreme Court.

The will of G. gave to his "grandchildren living in Michigan," at his decease, all his property in that state. A clause in a codicil stated that the testator was "in no wise pecuniarily indebted to any of his children," and declared null and void any testamentary gift to any one of them who should present a claim against the estate save for the bequest or devise given in the will. In an action by one of the executors for the construction of the will, the complaint questioned the right of one of the grandchildren to be a legatee as to that portion of the estate in Michigan, and also the right of a child of the testator who had presented and had been allowed and paid a claim against the estate to a gift in the will to him. It appeared that at the time the action was brought, there was pending in the Surrogate's Court a proceeding instituted by plaintiff's co-executor for a judicial settlement of his accounts, in which were brought all the parties to the action, and that by objections filed therein the question as to the effect of the clause in the codicil was raised. The trial court dismissed the complaint. *Held*, no error; that the question as to the residence of the grandchild was one of fact proper to be disposed of by the surrogate and constituted no ground for invoking the jurisdiction of the court; that the question as to the construction of the codicil was within the jurisdiction of the Surrogate's Court, and that tribunal having first obtained jurisdiction, was entitled to retain and continue to exercise it.

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Also *held*, it having been found that the action was not brought in good faith, that plaintiff was properly charged individually with the costs.

(Argued June 23, 1891; decided October 6, 1891.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department entered upon an order made October 23, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

E. K. Burnham for appellant. The Supreme Court had jurisdiction of this action. (*Wager* v. *Wager*, 89 N. Y. 161.) The Surrogate's Court did not have jurisdiction to pass upon the validity of the contract, or the effect of the acts of Gilbert in presenting his claim against the estate and prosecuting it to judgment. (*Van Sideren* v. *Lawrence*, 14 N. Y. S. R. 412; *Wright* v. *Fleming*, 76 N. Y. 517; *Stillwell* v. *Carpenter*, 59 id. 425; *Pettigrew* v. *Foshay*, 12 Hun, 486; *In re Giles' Estate*, 11 Abb. [N. C.] 57; *In re Brown*, 3 Civ. Pro. Rep. 39; *In re Wagner*, 22 N. Y. S. R. 208; *In re Gloucester*, 32 id. 901.) It was discretionary with the court to entertain this action, even if the Surrogate's Court had jurisdiction. (*Powell* v. *Denning*, 22 Hun, 235.) Costs should not have beed imposed upon the plaintiff personally. (*In re Groat*, 15 Hun, 361; *Hone* v. *DePeyster*, 106 N. Y. 645; *In re Deleplaine*, 18 N. Y. S. R. 985.) Mismanagement of the estate furnishes no ground for liability for costs. (Code. Civ. Pro. § 3246; *Jack* v. *Robie*, 15 N. Y. S. R. 607.) The estate of Thomas Vandevort was released from the legacies due to Gilbert and his family by the presentation of his claim against the estate, and its prosecution to judgment. (*In re Hollister*, 14 N. Y. S. R. 335; *Brownson* v. *Gifford*, 8 How. Pr. 387; *Hayden* v. *Stoughton*, 5 Pick. 528; *Brigham* v. *Shattuck*, 10 id. 306; *Sackett* v. *Mallory*, 1 Metc. 355; 4 Kent's Comm. [9th ed.] 126; *Hogeboom* v. *Hall*, 24 Wend. 146; 21 Pick. 389.)

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T. H. Bennett for respondents. The complaint did not state a cause of action. (*Bowers* v. *Smith*, 10 Paige, 193; *Wager* v. *Wager*, 89 N. Y. 161; *Powell* v. *Demming*, 22 Hun, 235.) The finding of fact "that this action was not brought by the plaintiff in good faith, but upon a mere pretext that there was a necessity for obtaining a judicial construction of the will of Thomas Vandevort, deceased, etc.," was clearly right, and should be affirmed. (*Knox* v. *Jones*, 47 N. Y. 389, 395; *Abell* v. *Douglass*, 4 Den. 305; 2 Kent's Comm. [7th ed.] 429, 527; Story on Conf. of Laws, §§ 465, 474; Code Civ. Pro. § 2546.) The Surrogate's Court, in which the former proceeding was pending, had unquestionable jurisdiction to hear, try and determine the question as to the right of the defendant, Gilbert M. Vandevort, and his descendants to take under the will after the presentation by him of a claim against the estate of Thomas Vandevort, or indeed any other question involving the construction of the testator's will and necessary to be determined as an incident to the settlement of the executor's accounts. (2 R. S. 95, § 71; Code Civ. Pro. §§ 2472, 2743; *Steinell* v. *Oechler*, 5 Redf. 312; *Gill* v. *Brower*, 37 N. Y. 459; *Cushman* v. *Horton*, 59 id. 149; *Teed* v. *Morton*, 60 id. 502; *McNulty* v. *Hurd*, 72 id. 518, 521; *DuBois* v. *Brown*, 1 Dem. 317; *Adee* v. *Campbell*, 79 N. Y. 52; 14 Hun, 551; *Tappen* v. *M. E. Church*, 3 Dem. 187; *Riggs* v. *Craig*, 89 N. Y. 479, 492; *In re Verplanck*, 91 id. 439, 449, 450; *Stevenson* v. *Short*, 92 id. 433; *Purdy* v. *Hayt*, Id. 446, 450; *In re Haxton*, 102 id. 157; *Wright* v. *Fleming*, 76 id. 517; *Stillwell* v. *Carpenter*, 59 id. 425; *Pettegrew* v. *Forshay*, 12 Hun, 486; *In re Giles' Estate*, 11 Abb. [N. C.] 57; *In re Brown*, 3 Civ. Pro. Rep. 39.) It is equally well settled that where the interference of two tribunals, having equal or concurrent jurisdiction is invoked, the jurisdiction must continue to be exercised by the court whose process is first issued. (*Schuele* v. *Reiman*, 86 N. Y. 270, 273; *Travis* v. *Myers*, 67 id. 542; *Rogers* v. *King*, 8 Paige, 210; *Groshan* v. *Lyon*, 16 Barb. 461; *Lewis* v. *Maloney*, 12 Hun, 207, 208; *Porter* v. *Kingsbury*, 13 id. 33, 37, 38; *Ratzer* v. *Ratzer*, 2 Abb. [N.

C.] 461, 466; *Vanderbilt* v. *Vanderbilt*, 54 How. Pr. 250, 252; *Whitney* v. *Monro*, 4 Edw. Ch. 5; *Seymour* v. *Seymour*, 4 Johns. Ch. 409.)

GRAY, J. The plaintiff sets forth, in his complaint, two grounds for bringing this action to obtain a construction of the will of Thomas Vandevort, deceased. The one sought to raise a question as to the residence of a grandchild, as bearing upon her capacity to be a legatee of certain property, and the other related to a clause of the codicil nullifying bequests and devises, in the event of any of the testator's children presenting to his executor claims against the estate, other than for the bequest or devise given in the will; practically speaking, cutting off the child in such an event. At the time this action was brought, there was pending in the Surrogate's Court, and undetermined, a proceeding instituted by this plaintiff's co-executor for a judicial settlement of his accounts; into which were brought all persons in interest and who are now made the parties to this action. Objections were there filed by this plaintiff and other parties to the executor's accounts, which raised, *inter alia*, the precise question which this complaint raises concerning the effect of the clause in the codicil above mentioned.

The first question in the complaint arises out of that portion of testator's will in which he gave to his "grandchildren living in Michigan at his decease, all his real and personal estate * * * in Michigan." The complaint questions the right of one of the grandchildren to be a legatee as to such portion of the estate, but the point was not argued in the appellant's brief and seems to have been abandoned. It could not well be pressed as constituting any ground for invoking the equity jurisdiction of the Supreme Court. Whether the particular grandchild was a resident of Michigan, or not, was a question of fact and one which the surrogate could perfectly well dispose of. The issue mainly contested in the Surrogate's Court, and which is relied upon now, was as to the right of the defendant Gilbert Vandevort, a child who prosecuted a claim against

the estate, or of his descendants, to receive any share under the will. The claim had been disputed, but, being allowed, had been paid by the executor. This fact was insisted upon before the surrogate as avoiding the child's interest under the will, by force of the provision in the clause of the codicil referred to. The learned judge at Special Term decided that the action was not brought in good faith and that the questions involved were within the jurisdiction of the surrogate to determine, and he, therefore, dismissed the complaint, charging the plaintiff personally with the costs. This disposition of the case I think we must all agree to have been a correct and just one.

There is no question but that the Supreme Court could entertain jurisdiction of an action brought by an executor to determine the force and validity of such a provision in a will; but it is not an exclusive jurisdiction. The surrogate had the power, as well, to construe the will in that respect. Though a judicial officer with limited and prescribed jurisdiction and powers, yet it is not open to question that in a proceeding before him, having for its object the settlement of an executor's accounts and to obtain a decree directing the distribution of the fund in his hands, and with all the parties in interest present, the surrogate may construe the provisions of the will and determine the meaning and validity of any of them, whenever such a determination is necessary in order to make his decree as to distribution. Such a jurisdiction is, of course, not general; but it is one which is incidental to his office, and which flows clearly from the authority conferred upon him by the statute. (See § 2472 of the Code of Civil Procedure.)

Subdivisions 3, 4 and 5 of the section of the Code cited would have but little meaning and force, if such a judicial exercise of the surrogate's authority were not impliedly granted. It is quite unnecessary to discuss this question at any length, for that has been already done in cases where it has arisen under the provisions of the Code of Civil Procedure and under the provisions of the Revised Statutes. It is sufficient to refer to the cases of *Matter of Verplanck* (91 N. Y. 439, 449) and of *Riggs* v. *Cragg* (89 id. 479).

Opinion of the Court, per GRAY, J.

The question there for the surrogate to determine was whether the presentment by, and the ultimate allowance to, a child of a claim against the estate precluded him from taking his share of his father's estate, under a clause of his will which recited that he was "in no wise pecuniarily indebted to any of his children," and proceeded to declare null and void a testamentary gift to the one presenting the claim. This situation required of him a decision as to whether the clause applied to such a case, and whether it was valid and enforceable. The present is unlike those cases where the issue raised was not as to the validity or meaning of the testamentary provisions, but involved the validity of some deed or agreement to affect the legatee's interest. Nothing of the kind appears here; for whether Gilbert Vandevort could take, or not, depended upon the surrogate's decision as to what effect, if any. should be given to the particular clause of the codicil. The surrogate's jurisdiction was equal to and concurrent with the Supreme Court, and following the well-established rule in such a case, the Surrogate's Court, as the tribunal which first obtained jurisdiction of the subject-matter and of the persons, retained and should continue to exercise that jurisdiction. (*Schuchle* v. *Reiman*, 86 N. Y. 270.)

I do not think it was error, or any abuse of discretion, for the court below to charge the costs upon the plaintiff personally. Of the two questions propounded in the complaint for determination, the one concerning the residence of the legatee was frivolous, inasmuch as the legacy had already been paid over, and the question was one merely of fact. The other issue tendered, as to the effect of the clause of the codicil, was at the time pending before and undetermined by the surrogate. To his jurisdiction in the matter, no objection had been made by this plaintiff. His action was begun upon the surrogate's referee holding that the surrogate had no jurisdiction to hear the issue, but before the surrogate had passed on the referee's report. There does not seem to have been any necessity, nor any good ground, for invoking the jurisdiction of the Supreme Court, and thereby delaying the proceedings before the surro-

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gate and burdening the estate with further expenses of litigation, and I think, under the circumstances, that the discretion of the court below was very properly exercised, and that it should not be interfered with by us.

The judgment below should be affirmed, with costs to be paid by the appellant personally.

All concur.

Judgment affirmed.

GEORGE C. UNGLISH, Appellant, *v.* GEORGE W. MARVIN, Respondent.

The parties entered into a verbal contract by which plaintiff agreed to occupy a portion of defendant's farm for a period of five years, each to do certain work and furnish certain things specified, the receipts of sales of the products of the land to be equally divided. Plaintiff took possession of the premises and occupied for over two years, when he was dispossessed. In an action to recover damages for breach of the agreement, *held*, that it was void, as it was not to be performed within a year; that the occupancy under it did not create a tenancy from year to year, and the relation of landlord and tenant in any form was not created either by the agreement or in consequence of any occupancy under it; and so, that plaintiff was not entitled to recover.

Plaintiff's counsel claimed that as the Statute of Frauds was not pleaded and no point with respect to said agreement made upon the trial, the defendant could not raise that question on appeal. *Held*, untenable; that an exception to the finding of the referee that plaintiff was entitled to recover damages upon an agreement held by him to be void, was sufficient to raise the question.

Plaintiff was dispossessed under a warrant issued to enforce a judgment of a justice of the peace in summary proceedings instituted by defendant; the judgment was reversed on appeal. The case here did not contain the record of the proceedings in either court, and did not show what questions were litigated before and decided by the justice, or upon what ground the County Court reversed the judgment, nor was there any finding of the referee upon that subject; he, however, found that the order of reversal was conclusive on the parties as to the validity of the contract. *Held*, error; that while an adjudication in said proceedings to the effect that the contract was valid would conclude the parties, although manifestly erroneous, it was incumbent upon plaintiff to show that it was so decided.

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A party relying upon a former adjudication as a bar, must show that the point involved was decided in the former suit.

(Argued June 24, 1891; decided October 6, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 1, 1889, which reversed a judgment in favor of defendant entered upon the report of a referee and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

John H. Chadsey for appellant. The referee's findings are conclusive upon this appeal. (Code Civ. Pro. §§ 993, 1023; *Burnap* v. *Nat. Bank*, 96 N. Y. 125; *Thompson* v. *Bank*, 82 id. 1; *Groff* v. *Ross*, 47 Hun, 152.) The only question then left for the referee was the question of damages, and this was the theory upon which the case was tried and submitted to the referee. (*Ross* v. *Colby*, 3 Hun, 546; *Peake* v. *Bell*, 7 id. 454; *Sheely* v. *Cannon*, 17 Wkly. Dig. 159; *Burrett* v. *T. A. R. R. Co.*, 45 N. Y. 631; *St. John* v. *Skinner*, 44 How. Pr. 198.) The General Term erred in reversing the judgment on the ground that the agreement was void by the Statute of Frauds. (*Schoonmaker* v. *Bonnie*, 119 N. Y. 566; *Quinlin* v. *Raymond*, 14 Daly, 87; *Duffy* v. *O'Donovan*, 46 N. Y. 226; *Marston* v. *Sweet*, 66 id. 206; *Harris* v. *Knicker-bocker*, 5 Wend. 638; *T. G. C. Co.* v. *Smith*, 110 N. Y. 93; *Bonmner* v. *A. S. Co.*, 81 id. 70; *Jackson* v. *Van Slyke*, 52 id. 645; *Delaney* v. *Brett*, 51 id. 78; *Wolf* v. *S. Ins. Co.*, 39 id. 49; *Thayer* v. *Marsh*, 75 id. 340; *Adams* v. *I. N. Bank*, 116 id. 614; *Murray* v. *Usher*, 117 id. 542; *Wells* v. *World's Dispensary*, 120 id. 632; *Sterret* v. *N. Bank*, 112 id. 661.) The judgment should not be reversed on account of the referee's conclusion that the occupancy created a tenancy from year to year. (*Middletown* v. *R. O. R. R. Co.*, 43 How. Pr. 481; *Chrieteneen* v. *Colby*, 43 Hun, 362; *Wissee* v. *O'Brien*, 3 J. & S. 149; *Marvin* v. *U. L. Co.*, 85 N. Y. 284.) The judgment of the County Court of Onondaga county upon an

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appeal from the final order in summary proceedings is an adjudication that the plaintiff's term had not ended. (*Tuska* v. *O'Brien*, 68 N. Y. 449; *Smith* v. *Smith*, 79 id. 634; *Kelsey* v. *Ward*, 38 id. 83; *White* v. *Cortsworth*, 6 id. 137; *Jarvis* v. *Driggs*, 69 id. 143; *Brown* v. *Mayor*, *etc.*, 66 id. 385; *Demored* v. *Brig*, 32 id. 281; Code Civ. Pro. §§ 2231, 2236, 2244, 2247, 2263; *Hayden* v. *F. S. M. Co.*, 54 N. Y. 221; *Eten* v. *Layster*, 60 id. 252; *Woods* v. *Kernan*, 10 N. Y. Supp. 654.) The defendant is estopped from taking any advantage from the Statute of Frauds, or of the judgment recovered by him. (*Royes* v. *Watrous*, 73 N. Y. 597; *Wendell* v. *Hirt*, 39 Hun, 382; *Pope* v. *O'Hara*, 48 N. Y. 452, 453; *Sherman* v. *Scott*, 27 Hun, 331; *Hobbs* v. *Weatherwax*, 38 How. Pr. 385; Code Civ. Pro. §§ 2232, 2236.). Part performance of contract took the same out of the Statute of Frauds. (*Phillips* v. *Thompson*, 1 Johns. Ch. 131; *Byrne* v. *Romaine*, 2 Edw. Ch. 445; *Cronkhite* v. *Cronkhite*, 94 N. Y. 323; *Tyler* v. *Church*, 54 id. 634; *Wendell* v. *Hirt*, 39 Hun, 382; *Collier* v. *Corte*, 17 Barb. 471; *Tomlinson* v. *Miller*, 1 Speed, 197; 3 Keyes, 517; *Abbott* v. *Draper*, 4 Den. 51.) The agreement was one which could not be terminated without notice of some kind being given to the plaintiff. (*Schoonmaker* v. *Bonnie*, 119 N. Y. 566; *Lounsberry* v. *Vandermark*, 31 id. 514; *Schuyler* v. *Leggett*, 2 Cow. 660; *Reeder* v. *Sayer*, 70 N. Y. 180; *Loughron* v. *Smith*, 75 id. 205; *Coudert* v. *Cohn*, 118 id. 309; *Talamo* v. *Spitzmiller*, 120 id. 37; *Harris* v. *Frink*, 49 id. 24; McAdam on L. & T. 35, § 24; *Rosenpaugh* v. *Verderburgh*, 16 Hun, 61; *Mohoning* v. *Farley*, 17 Wkly. Dig. 275; Wood on L. & T. 45, § 17.) The referee's finding as to notice to quit is correct. (*Osgood* v. *Toole*, 61 N. Y. 475; *Adams* v. *G. Ins. Co.*, 70 id. 166; *Reeder* v. *Sayre*, Id. 190; *Stone* v. *C. Church*, 17 Wkly. Dig. 179; *Bommer* v. *A. S. Co.*, 81 N. Y. 470; *Boen* v. *Scheenkelser*, 110 id. 60.) The defendant's claim upon the trial, that all of the plaintiff's interests in the property had been sold and the same bid in by the defendant and one John F. Unglish, and that, therefore, the plaintiff could have no cause of action against him is not tenable.

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(Code Civ. Pro. §§ 2232, 2236, 3026; *Green* v. *Armstrong*, 1 Den. 554; 1 Add. on Cont. § 206; *Bank of Lansingburg* v. *Crary*, 1 Barb. 542; 1 Waite's Law & Pr. 639; 2 id. 729; *Bishop* v. *Bishop*, 11 N. Y. 124; *Frank* v. *Harrington*, 35 Barb. 416; *Webster* v. *Zielby*, 52 Barb. 482; *Killmore* v. *Howlett*, 48 N. Y. 569; Herman on Executors, §§ 185, 160; *Hobbs* v. *Wetherwax*, 38 How. Pr. 385.) The reception of expert evidence was proper. (*Fontain* v. *Potter*, 38 N. Y. 186; *Steritt* v. *Bank*, 122 id. 462; Greenl. on Ev. [13 ed.] 440; *Smith* v. *Gugety*, 4 Barb. 614; *Ferguson* v. *Hubbell*, 97 N. Y. 507; *Doe* v. *Roe*, 32 Hun, 628; *Amadon* v. *Ingersoll*, 34 id. 132; *Ward* v. *Kilpatrick*, 85 N. Y. 413; *Baird* v. *Daly*, 68 id. 551; *Price* v. *Harthorn*, 44 id. 94.) The court is not bound to reverse a judgment on account of the reception of immaterial evidence. (*Adam* v. *Book*, 116 N. Y. 15; *Tenny* v. *Burger*, 93 id. 524.) The damages allowed by the referee were proper. (*Taylor* v. *Bradley*, 39 N. Y. 129; *Van Wyck* v. *Allen*, 69 id. 68; *White* v. *Miller*, 71 id. 132; *Masterton* v. *Mayor*, *etc.*, 7 Hill, 61; *Ragely* v. *Smith*, 10 N. Y. 489; *Donalds* v. *State*, 89 id. 36; *Drake* v. *M. R. R. Co.*, 106 id. 164; *Savery* v. *Ingersoll*, 46 Hun, 176; *Schile* v. *Brookhorse*, 80 N. Y. 614.)

M. M. Waters for respondent. The complaint avers and the evidence conclusively shows that the void agreement was merely an agreement to work the land on shares, and under such an agreement the relation of landlord and tenant is not created. (*Putnam* v. *Wise*, 1 Hill, 234; *Taylor* v. *Bradley*, 39 N. Y. 129; *Armstrong* v. *Bicknell*, 2 Lans. 216; *Reynolds* v. *Reynolds*, 48 Hun, 142; 2 Add. on Cont. 31, 37.) It is error to hold as matter of law that a tenancy from year to year (if one existed) "could only be terminated by limitation or by the notice prescribed by law." (*Parke* v. *Castle*, 19 How. Pr. 29; *Schuyler* v. *Smith*, 51 N. Y. 309; *Gibbons* v. *Dayton*, 4 Hun, 451; *Thomas* v. *Nelson*, 69 N. Y. 118.) Under a void lease the tenant cannot be compelled to pay beyond the time he actually occupies. (*Thomas* v. *Nelson*, 69 N. Y. 118.) The plaintiff's interest in the bushes, vines

and berries was no part of the realty unless plaintiff was the owner of the land. (*Jenks* v. *Smith*, 1 Com. 90; 1 Den. 580; *Reynolds* v. *Reynolds*, 48 Hun, 142.) The opinion of the witnesses as to the average yield of vines and bushes in Monroe county was incompetent. (*Van Wagener* v. *N. Y. C. Co.*, 36 Hun, 552.)

O'BRIEN, J. The plaintiff sought in this action to recover damages for breach of a verbal agreement made with the defendant, by which he agreed to occupy seven or eight acres of defendant's farm for five years from the spring of 1884, on the following terms and conditions: The defendant was to furnish for plaintiff's use and occupancy the house and garden on the premises, the lower part of the barn, pasture for a horse and cow, such straw for feed and bedding as might be needed and the use of a horse in the busy season. Also to prepare so much of the ground as they might conclude to be desirable for the reception of plants and bushes, furnish one-half the sets of plants and bushes, pay one-half the cost of picking the small fruits and berries, and build a dry-house. The plaintiff was to furnish half the sets of plants and bushes, plant the small fruits, various kinds of berries and currants, upon some seven or eight acres of the farm to be used for this purpose, to hoe and care for the berries then on the place, cultivate and care for the plants and bushes to be set out, to pick the berries and currants when ripe, market and sell them, to dry and sell those remaining, and to divide the money received on such sales, less the cost of picking, equally beween himself and defendant. Under this agreement, the plaintiff took possession of the premises March 6, 1884, and occupied them till April 22, 1886, when he was dispossessed and ejected under a warrant issued by a justice of the peace, in summary proceedings, under the statute, instituted by the defendant. The plaintiff, after going into possession, performed various acts under the agreement and accounted for the fruit and other products sold to the defendant. On the trial of the action before a referee, the plaintiff recovered $2,153 damages, on the ground that he had

been deprived by the defendant of the use of the land for the balance of the five years, and of the fruits of the agreement. The General Term has reversed this judgment, and as the plaintiff claims, improperly. The referee found that the parol agreement under which the plaintiff went into possession, was void, but that occupancy under it created a tenancy from year to year, which could only be terminated by limitation or notice; that plaintiff's term did not end till March 6, 1888, and that he was entitled to recover as damages the value of the remainder of the term. The agreement was not in writing and was not to be performed within one year, and hence it was void by the Statute of Frauds. But, notwithstanding this, the referee allowed the plaintiff to recover precisely the same as if the agreement had been in writing, and was in all respects valid and binding on the parties. This result was accomplished by holding that occupancy, under the agreement, created a tenancy from year to year. We do not understand that the learned counsel for the plaintiff attempts to sustain this proposition, and it is obviously unsound. The relation of landlord and tenant in any form was not created either by the agreement itself or in consequence of any occupancy under it. (*Putnam* v. *Wise*, 1 Hill, 234; *Taylor* v. *Bradley*, 39 N. Y. 129; *Reynolds* v. *Reynolds*, 48 Hun, 142.)

It has never been held that a tenancy from year to year can grow out of such an occupancy, though it may out of an occupancy under a void parol lease for more than a year. (*Coudert* v. *Cohn*, 118 N. Y. 309; *Loughran* v. *Smith*, 75 id. 205; *Reeder* v. *Sayre*, 70 id. 180.)

The counsel for the plaintiff contends that, as the Statute of Frauds was not pleaded, and no point with respect to the void agreement made upon the trial, the defendant cannot raise that question now. That might be so were it not for the findings of the referee that the agreement was by parol and was void. The conclusion of law that the plaintiff was entitled to recover damages for breach of a verbal agreement held to be void, was excepted to by the defendant, and this, we think, raises the question. In so far as the contract was executed between the

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parties, they have the right to retain what was received under it, according to its terms, but an action at law to recover damages, in consequence of a failure of either party to carry it out, cannot be maintained. Suppose the plaintiff, at the end of one, or even of two, years, left the farm and refused to further perform the agreement, on what principle could the owner of the land be permitted to maintain an action against him for damages in not remaining on the farm for five years and performing in all other respects the verbal agreement? The agreement is binding upon both parties, or not at all, and it is quite clear that it was void under the statute and that neither party could maintain an action to recover damages for its breach against the other. The learned referee found that the plaintiff was ousted from the premises by force of a warrant in summary proceedings issued after judgment by a justice of the peace, and that this judgment was reversed by the County Court. Then he finds, as a conclusion of law, that the order of the County Court reversing, on appeal, the decision of the justice in summary proceedings, is conclusive on the parties. Probably, what was meant by these findings was that the County Court, in reversing the justice's judgment, held that the agreement was valid and that such decision was conclusive. That would probably be so if the record contained the facts necessary to uphold such a legal conclusion. The judgment of any court having jurisdiction of the parties and the subject-matter, to the effect that the agreement was valid and binding on them, would, though manifestly erroneous, conclude the parties on that question in any subsequent action. But the difficulty is in this case that the record fails to show what questions were litigated before and decided by the justice, or upon what grounds the County Court reversed the judgment. A party relying upon a former adjudication must show that the point involved was decided in the former suit.

Whatever the fact may be, we have no right to say, from the record before us, that the validity or binding character of the verbal agreement was adjudicated in favor of the contention of the plaintiff, either by the justice or the County Court.

Statement of case.

The case does not contain the record of proceedings in either court, and there is no finding by the referee to show what was decided in the first instance, or upon what ground the reversal in the County Court proceeded. The order of the General Term was right, therefore, and should be affirmed, and judgment absolute ordered for the defendant on the stipulation, with costs.

All concur.

Order affirmed and judgment accordingly.

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128 387
131 348

LEWIS M. TEEL, Respondent, *v.* ABRAHAM YOST, Appellant.

Neither process, declaration nor personal appearance of the defendant in any form is requisite in order to authorize the rendition, by a competent court, of a valid personal judgment by confession; an appearance upon the entry of the judgment of an agent, appointed by the defendant and authorized to appear, constitutes an appearance by him and gives the court, jurisdiction to render judgment to the effect authorized.

It is not necessary that a power of attorney to confess judgment should be acknowledged or attested by a subscribing witness.

The filing in court of a power of attorney authorizing the confession of judgment for a specific sum gives the court jurisdiction over the party executing it, and authority to enter judgment for the sum specified, without proof of the nature, existence or amount of the debt.

The provision of the Code of Civil Procedure (§ 1274) in relation to judgments by confession, requiring the defendant to state the nature and circumstances of the indebtedness and to verify the same, has no relation to the jurisdiction of the court or the authority of the clerk to enter judgment; its only purpose is to protect creditors from a judgment fraudulently confessed by an insolvent debtor; and so, the omission of the verified statement does not render the judgment void, but only voidable at the instance of certain creditors; it may not be impeached by the defendant because of the omission.

The history of legislation in this state, in relation to judgments by confession given.

The decisions of the highest courts of a state, as to the force and effect to be given to judgments of the courts of that state, may not be disregarded by the courts of another state, except for the gravest reasons and those demanded by the clearest rules of public policy and justice.

Statement of case.

A judgment by confession entered in another state upon a promissory note containing an authority to any attorney of the state to confess judgment for the sum agreed to be paid, if valid as a judgment *in personam* under the laws of that state is equally valid here, and may be enforced by action in this state.

The fact that such a judgment was entered before the maturity of the note, does not affect its validity here, in case it appears that the judgment was authorized by the laws of the state where it was rendered.

The manner of entry of such a judgment is matter of form, to be regulated by the laws of the state where it was rendered.

In an action upon a judgment by confession rendered by a court of general jurisdiction of Pennsylvania, it appeared that said judgment was entered by the prothonotary, the clerk of the court, upon an instrument known as a "judgment note," filed with the records of the court which, after a promise to pay a certain sum, authorized "any attorney of any court of record in Pennsylvania or elsewhere, to confess judgment therefor," and waived all stay of execution from and after the maturity of the note. Both parties to the note resided in Pennsylvania. It appeared that such notes were authorized by the laws of said state and that a prothonotary, as the clerk of the court, upon application of the owner of the note is required to enter judgment thereon against the person executing the same, without the agency of any attorney, and it was found that the judgment was duly rendered according to the law of Pennsylvania. *Held*, that the judgment was valid and conclusive against defendant here.

Reported below, 25 J. & S. 481.

(Argued June 24, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made the first Monday of December, 1889, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Lemuel Skidmore for appellant. The alleged judgment record shows that there was nothing offered to the Pennsylvania court as the basis of a judicial decision. It is in the nature of a mere memorandum by the clerk, and does not amount to a judgment. (*Cromwell* v. *Bank of Pittsburg*, 2 Wall. 584; *Thatcher* v. *Blackbourne*, 1 N. H. 242; *Doughty*

Statement of case.

v. *Doughty*, 28 N. J. Eq. 585.) The judgment alleged was not a judgment by confession. (*Baldwin* v. *Freydendohl*, 10 Ill. App. 106.) The Pennsylvania law does not authorize entry of judgment for an amount not appearing to be due. (*Allen* v. *Patterson*, 7 N. Y. 476; 3 Chitty Pr. 669; *Allen* v. *Smillie*, 1 Abb. Pr. 354; *Nicholl* v. *Bromley*, 2 B. & B. 464.) The court erred in allowing Mr. Ward, against the objections of the defendant, to explain the meaning and intention of the prothonotary in entering the so-called judgment. (Best on Evidence, §§ 590, 591.)

Samuel Blythe Rogers for respondent. The Court of Common Pleas of Northampton county, Pennsylvania, is a court of general jurisdiction. (*Pringle* v. *Woolworth*, 90 N. Y. 502; *Hatcher* v. *Rochelau*, 18 id. 86, 95.) The defendant, being domiciled in Pennsylvania at the time the judgment was entered there, was bound personally by the judgment, provided it was rendered in accordance with the laws of that state. (*Teel* v. *Yost*, 24 J. & S. 456; *Trebilcox* v. *McAlpine*, 46 Hun, 469; *Huntley* v. *Baker*, 33 id. 578; *L. Ins. Co.* v. *French*, 18 How. [U. S.] 404; *Gibbs* v. *Q. Ins. Co.*, 63 N. Y. 114, 126; *Hunt* v. *Hunt*, 72 id. 238; 1 Whart. on Ev. § 808; *Elsasser* v. *Haines*, 52 N. J. L. 17; *Huntley* v. *Baker*, 33 Hun, 578.) The judgment sued on is, under the laws of Pennsylvania, in every respect a valid, binding, personal judgment. (Laws of 1806, chap. 122, § 28; *Braddie* v. *Brownfield*, 4 Walts, 474; *Bartholomew* v. *Wood*, 61 Penn. St. 100; *Colvin v. Blymer*, 121 id. 582; *Montague* v. *McDowell*, 99 Penn. 265; *Hopkins* v. *West*, 2 Norris, 109; *Rutherford* v. *Boyer*, 3 id. 347; *Hageman* v. *Salisberry*, 74 Penn. St. 280, 284.) The record here proved is sufficient to show the rendition of a judgment. (*Lewis* v. *Smith*, 2 S. & R. 142, 155; *Cromwell* v. *Bank of Pittsburg*, 2 Wall., Jr. 569, 581; *Commonwealth* v. *Conrad*, 1 Rawle, 249; *Helvete* v. *Rapp*, 7 S. & R. 505; *Regina* v. *Yeomley*, 8 Ad. & El. 806, 818; *Leathers* v. *Cooley*, 49 Me. 337, 343; *Washington S. P. Co.* v. *Sickles*, 24 How. [U. S.] 333, 340.) The record is not a mere memorandum of

the clerk, but the only judgment in the case. (*Hatcher* v. *Rochelau*, 18 N. Y. 86, 94; *Smith* v. *Tiffany*, 1 T. & C. 552; *Whittaker* v. *Bramson*, 2 Paine, 209, 222.) It does not affect the validity of the judgment that it was entered before the note was due. (*Montelius* v. *Montelius*, 1 Bright. 79; *Helvete* v. *Rapp*, 7 S. & R. 305; *Cooper* v. *Shauer*, 101 Penn. St. 547; *Scudder* v. *Coryell*, 10 N. J. L. 345; *Sand Blast Co.* v. *Parsons*, 54 Conn. 313.) Appellant ignores entirely the element of assent on the part of the defendant which renders the judgment valid. (*Reynolds* v. *Hall*, 2 Ill. 35; *Feemster* v. *Ringo*, 5 T. B. Mon. 336; *Duckham* v. *Smith*, Id. 372; *Rigney* v. *White*, 4 Daly, 400.) If the defendant had any defense to the note or complaint to be made of the judgment they might and should have been presented to a Pennsylvania court. (*Montague* v. *McDowell*, 99 Penn. St. 267.)

RUGER, Ch. J. This was an action upon a judgment, and the question involved is, whether the record in evidence constituted a valid judgment in another state by confession.

In the case of such a judgment it is, of course, unnecessary that any process should be issued or served, declaration filed, or personal appearance entered by the defendant, as these proceedings are totally inconsistent with the nature of a judgment by confession. The appearance by an attorney, under a written power from the party, authorizing his consent to a judgment, is the legal equivalent of the process and proceedings usually taken in an action *in invitum*. In all such cases it is simply a question as to what the principal has authorized to be done in his name, and does not involve any of the questions arising in an action *in invitum* against resident or non-resident defendants. The judgment sued upon purported to have been rendered by the Court of Common Pleas of the state of Pennsylvania, on the 14th day of January, 1878, in favor of the plaintiff, Lewis M. Teel, and against the defendant Abraham Yost, for $2,268, D. S. B., or as upon debt without process. It was entered upon an instrument, filed in the records of the court, reading as follows:

"$2,268. "SOUTH BETHLEHEM, *January* 12, 1878.

"One year after date I promise to pay Lewis M. Yost, twenty-two hundred and sixty-eight dollars, without defalcation, for value received. And I also hereby authorize any attorney of any court of record in Pennsylvania, or elsewhere, to confess judgment therefor and release of errors, and I do hereby waive all stay of execution from and after the maturity of the above note. Witness my hand and seal the day and date above written, with ten per cent allowed for collection fees, with interest from date.

"ABRAHAM YOST. [L. S.]

"Witness present:

"GEO. ZIEGENFUSS."

This instrument is usually called a judgment note, an obligation quite common in the state of Pennsylvania. The parties to the note were both residents of that state, and had been so for a long time previous to and after the rendition of the judgment, and the Court of Common Pleas was a court of general jurisdiction in that state, of which the prothonotory was clerk and had charge of its records, and authority to enter judgments by confession. If the court in Pennsylvania had jurisdiction of the person of the defendant and the subject-matter of the action, whatever course it might afterwards have pursued in determining the rights of the parties, they cannot be heard now to relitigate the questions considered in that action. As to such matter, upon the principle of *res ajudicata*, the judgment is binding and conclusive upon the parties. If this was a valid judgment under the laws of the state where it was rendered, it must, under the Constitution of the United States and the laws of congress, be accorded the same force and effect in this state that it had in the state where rendered. (§ 1, art. 4, Constitution U. S.; § 905, U. S. R. Statutes.)

The rule laid down in *Shumway* v. *Stillman* (6 Wend. 453), was: "That the judgment of a court of general jurisdiction, in any state in the Union, is equally conclusive upon the parties in all the other states as in the state in which it was ren-

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dered. This, however, is subject to two qualifications. First. If it appears by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and, second, if it appears by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him." This case has been quite uniformly cited and approved as a leading case in subsequent cases in this state.

Under the authority of this rule, we do not see how the defendant could have been seriously prejudiced by the want of notice of the proceedings leading to the judgment, as it was competent for him to show in defense of this action that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon anyone to appear for him and confess judgment thereon; but no such proof was given or offered upon the trial. The presumption, therefore, is that the note was the genuine obligation of the defendant and gave actual authority to the prothonotary, or any other attorney, to consent to the judgment authorized by it.

Several objections are raised to the recovery in this action; some of them going to the form of the judgment, and others assailing the jurisdiction of the court to render it; but we are of the opinion that none of them are well founded. It was found by the trial court as a question of fact that said "judgment was duly rendered and entered according to the laws of Pennsylvania. It is and was by the laws of Pennsylvania, a valid, binding adjudication *in personam*, against the defendant herein, and entitled by the laws of said state to have the same faith and credit given to it as if it had been entered upon a verdict after a trial in which the defendant had appeared." A finding of law to the same effect was made by the court, and it is upon exceptions to these two findings that the questions in the case arise.

These findings were amply supported by the evidence, and unless, therefore, it appears that some error of law was committed by the court on the trial, the judgment must be sustained. The evidence leaves no room for doubt but

that this was considered in form and substance a valid judgment *in personam*, in the state where it was rendered, and constituted a judgment within the meaning of the acts of congress requiring faith and credit to be given to it in other states. The reasons for this conclusion are so well stated in the opinions of the Supreme Court of that state, that we shall content ourselves with reference to two reported cases only.

It was said in the case of *Helvete* v. *Rapp* (7 Serg. & Rawle, 306): "The evident and sole intention of the legislature in conferring the power of entering a judgment on the judgment bond without the intervention of an attorney, was to exempt the obligor from the payment of costs to an attorney. This act was passed on 24th February, 1806. It provided that the prothonotary of any court of record, on the application of the original holder or his assignee, of a bond, note or other instrument on which judgment is confessed, or containing a warrant of attorney to confess a judgment, shall enter judgment against the person or persons who executed the same for the amount which, from the face of the instrument, appears to be due without the agency of any attorney or declaration filed, particularly entering on his docket the date and time of the writing, which shall have the same force and effect as if a declaration had been filed and judgment had been confessed by an attorney or given in open court in term time. * * * There being no literal form directed, and no precedent to guide the prothonotary in the exercise of this new duty, each has adopted his own mode; they are as various as their faces, and many of them scarcely present a feature to inform a purchaser or designate a judgment; but here is a substantial entry of a judgment bond, containing all that is necessary to give information. It is entered on the docket in the form of an action as a judgment bond, the names of the parties, the amount due, the date and time of the writing. It states the entry of a judgment bond, and seal of the defendant; the judgment bond is filed of record, entered the 17th May, 1815. What is entered? A judgment on the bond filed. No man could be deceived by

this mode of entry, for however inartificial it may be, however defective in the technical words of a judgment, none who called for information would be led into error; the docket entry gave full information. It might have been more formal. but still, it is the entry of a judgment, entered by the prothonotary who was authorized to make the entry."

The head-note in the case of *The Commonwealth for the Use of Black* v. *Conrad* (1 Rawle, 249) reads that "a prothonotary complies substantially with the directions of the act of assembly of the 24th February, 1806, when in entering judgment on a bond with warrant of attorney, upon the application of the party, he enters on his docket the names of the obligor and obligee in the form of an action as parties, the date of the bond and warrant of attorney, the penal sum, the real debt, the time of entering the judgment and the date of the judgment on the margin of the record."

These clear and explicit announcements by the highest courts of the state, of the force and effect given to such judgments in that state, are entitled to the highest respect, and cannot, without ignoring the requirements of comity and propriety prevailing among sister states, be disregarded by the courts of other states. It should, in any event, be for the gravest reasons alone, and those demanded by the clearest rules of public policy and justice, that the courts of one state should deliberately deny to the decisions of the courts of another state the authority which they possess in the state where rendered. So far from the questions in this case being of that character, we are of the opinion that judgments by confession, in all material respects similar to the one under consideration, are not only valid judgments at common law, but have been authorized by the statute laws of most of the states of the Union, and, among others, by our own.

The principal claim made by the defendant on the argument of the case here, was that the note did not authorize a confession of judgment upon it before it was due; although it was also claimed that the record produced did not constitute a judgment, in as much as it did not appear thereby

that process was issued and served on the defendant, or declaration filed, or personal appearance made by him, or proof taken of the cause of action by the court, and, therefore, that it had no jurisdiction to render a judgment. We have already stated that in judgments by confession neither process, declaration nor personal appearance are anywhere required in order to authorize the rendition of a valid personal judgment by a competent court. The appearance of the agent appointed by the party in his warrant of attorney upon the entry of the judgment, constitutes, to every intent and purpose, an appearance by the party and gives the court jurisdiction to render a judgment to the effect authorized, against his principal.

We are also of the opinion that the entry of judgment before the maturity of the note, was sanctioned not only by the law of Pennsylvania, but by that of every other country where judgments by confession are permitted. The evidence in the case showed that it was the common practice in Pennsylvania to enter judgment on such notes at any time after their date, without respect to the time when they became due; but the prothonotary was not authorized to issue execution for their collection until, by the terms of the note, it became due.

The cases of *Commonwealth* v. *Conrad* (1 Rawle, 249), *Montelius* v. *Montelius* (1 Brightly, 79) and *Helvete* v. *Rapp* (7 Serg. & Rawle, 305) are examples of judgments on such notes; and in *Cooper* v. *Shaver* (101 Pa. St. 547) an application to set aside the entry of judgment on a collateral obligation guaranteeing the collection of a judgment with warrant of attorney was denied, although no proof was given that an effort had been made by, or that the plaintiff was unable to collect the original judgment.

In New Jersey, where the practice of giving bonds and notes with warrant of attorney is similar to that prevailing in Pennsylvania, the court held that it was not error to enter a judgment by confession upon a note before it became payable.

In this case there is no restriction upon the authority of the attorney to confess judgment, and the waiver of a stay of execution after the maturity of the note constitutes an implied

admission on the part of the defendant that judgment could be entered previous to that time.

Under the former practice of entering judgments upon a warrant of attorney it was uniformly held in England and this country, that where the warrant is given to secure the payment of money it is not necessary that the plaintiff should delay the signing of judgment until default be made in the payment, unless there is some restriction as to the time of entry in the warrant. (See Graham's Practice, 773, and cases cited.)

We are, therefore, of the opinion that the entry of the judgment before the maturity of the note was in accordance with the settled practice, not only in Pennsylvania, but also in other jurisdictions where judgments by confession are authorized.

There are, also, some authorities in this state holding, substantially, that judgments similar to the one in question, when rendered under the authority of the law of the state in which they are entered, may be enforced by action in this state. That doctrine was, impliedly, held in *Trebilcox* v. *McAlpine* (46 Hun, 471) by the General Term in the third department, where a judgment entered upon a Pennsylvania note similar to that under consideration, was held to be a valid judgment *in personam* in this state under the laws of congress, provided it was authorized by the law of the state where it was rendered.

The judgment in that case was reversed because it was not shown that the law in Pennsylvania authorized the entry of such a judgment. In *Huntley* v. *Baker* (33 Hun, 578) it was held by the General Term of the fifth department that, by reason of the relations between the state and its citizens, which afford protection to him and his property and impose duties on him as such, he may be charged by judgment *in personam*, binding on him everywhere as the result of legal proceedings instituted and carried on in conformity to the statute of the state furnishing a method of service which is not personal, and which, in fact, may not become actual notice to him even though he is absent from the state when the judgment is

entered. In that case the law authorized the service of a summons at the usual place of abode of the defendant, in case of his absence from the state, and the service was made by leaving it there in the presence of his wife.

In *Gibbs* v. *Queens Ins. Co.* (63 N. Y. 114) it was held that where a foreign fire insurance company has designated an agent in compliance with the state insurance laws, making the appointment of an attorney or agent in this state, upon whom process in suits against the company may be served, a prerequisite to its doing business in the state, it thereby submits itself to the jurisdiction of the state courts having authority to act; and by service of a summons on an agent so designated, the court acquires jurisdiction and may render a judgment valid and capable of being enforced upon any property within the jurisdiction. The court in that case refers to the case of *Douglas* v. *Forrest* (4 Bing. 686), where the decrees sued upon were pronounced in Scotland against a native thereof who went out of the jurisdiction before the commencement of the action and never returned, and had no notice of the proceeding. The decrees ordered him to pay certain sums of money. He had been summoned by posting according to the laws of Scotland. The Court of Common Pleas of England held these decrees to be consistent with the principles of justice. The ruling, however, was confined to a case "where the party owed allegiance to the sovereignty which gave the judgment from being born under it, and from his property being protected by it."

The court also cited *Becquet* v. *MacCarthy* (2 Barn. & Ad. 951), where it was held that a "judgment *in personam*, obtained in a British colony against an absent party without notice to him, but by the service, according to local law, upon the king's attorney-general for the colony, was not so contrary to natural justice as to be void." And in *Hobhouse* v. *Courtney* (35 Eng. Ch. Rep. 119) it was held that where a non-resident has created an attorney in fact to deal with the particular matter afterward in suit, a service on such attorney will be good service upon the principal.

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We may also refer to the case of *Vallee* v. *Dumergue* (4 Exch. 290), where the defendant, a resident of England, was a shareholder in a French corporation, and, by the law of France, was required to elect a domicile, where the directors of the company might notify him of all proceedings of the company or its shareholders. By the law of France, all legal proceedings affecting any party having his real domicile out of that kingdom, left for him at such elected domicile, were as valid as if left at his real domicile in France. A judgment recovered by default upon process served at such elected domicile was held to be a valid judgment *in personam*, Baron ALDERSON saying: "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings, should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them."

To come, however, more particularly to judgments by confession, I am of the opinion that the one under consideration conforms to all of the requirements of the law in the various countries where such judgments have been authorized. It is stated in Chitty's General Practice (2 vol. pg. 333, 1st ed.), in speaking of the jurisdiction of the Court of King's Bench, that: "This court (as well as Common Pleas and Exchequers) has an exclusive summary jurisdiction (as well of an equitable as of a legal nature) over a warrant of attorney, authorizing a judgment in the particular court and all proceedings thereon, to entertain a motion to set the same aside if it authorize a judgment in that particular court, and it has been usual to frame that security under seal, enabling certain attorneys therein named, or any other attorney of a particular court, to appear in that court as attorney for the party, and to receive a declaration in an action, usually of debt, for a named sum at the suit of the creditor, and to confess such action, or suffer judgment by *nil dicet*, or otherwise, to be entered up against the party, and also authorizing such attorneys, respectively, to release any errors in the proceeding. * * * How or when this peculiar security for a debt, authorizing a creditor,

as it were, *per saltum*, to sign a judgment and issue an execution without even issuing a writ, was first invented, does not appear, but it has now become one of the most usual collateral securities on loans of money." It is further said, with reference to the form of the warrant of attorney, that "it need not in strictness be under seal, though usually so, in order to authorize the release of errors."

But it will, perhaps, be more satisfactory to show that a practice, similar to that prevailing in Pennsylvania, obtained in our own state from the earliest times to the adoption of the Code in 1848. The earliest allusion to this practice occurs in chapter 15 of the Colonial Laws of 1774, under the title: "An act for the better discovery of judgments in the courts of record in this colony," wherein it is provided that the clerks of courts of record, within six days after every term or court, shall enter in an alphabetical docket the name of the party against whom the judgment is entered, with a particular "of all judgments by confession, *non sum informatus*, or *nil dicet*, etc." By chapter 104 of the Laws of 1801, it was provided "that no judgment shall be entered upon any bond or contract in writing, hereafter to be made, upon the confession of any attorney, by virtue of any authority whatever contained in the same instrument * * * with such bond or contract, and no judgment shall be entered upon any confession taken out of court before any judge, etc."

By section 8 of chapter 259 of the Laws of 1818, it was provided that a confession of judgment by bond and warrant of attorney should contain a particular statement and specification of the nature and consideration of the debt or demand and in default thereof the judgment should be adjudged fraudulent as to other *bona fide* creditors. Certain other provisions, in relation to warrants of attorney, not material to be particularly noticed, are found in chapter 48 of the Laws of 1813, and chapter 50 of the same year, and other years previous to 1828.

By section 10, article 1, title 4, chapter 6 of the Revised Statutes it was provided: "That judgments may be entered in

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the Supreme Court, or in any Court of Common Pleas, in vacation or in term, upon a plea of confession signed by an attorney of such court; although there be no writ then pending between the parties, if the following provisions be complied with, and not otherwise: First. The authority of confessing such judgment shall be in some proper instrument, distinct from that containing the bond, contract or other evidence of the demand, for which such judgment is confessed. Second. Such authority shall be produced to the officer signing such judgment and shall be filed with the clerk of the court in which the judgment shall be entered at the time of filing and entering such judgment." It was also provided by section 4, title 3 of the same chapter, that in cases of an action upon a written instrument for the payment of money, where the defendant had suffered default or upon confession, that a reference might be had to the clerk to assess damages, and in assessing such damages the production to the clerk of the instrument, set forth in the declaration, shall be sufficient evidence of the same without any other proof.

The practice under these statutes is described by Graham, in his work on Practice, as follows: "A warrant of attorney is a written authority to the attorney to whom it is directed, or, as is more generally the case, to any attorney of the Supreme Court or any other court of record, to appear for the party executing it and receive a declaration for him in an action at the suit of a person therein mentioned, and thereupon to confess the same or to suffer judgment to pass by default; it also, in general, contains a release of errors. It must be subscribed by the defendant and must be in some proper instrument (usually by deed in the presence of a subscribing witness, although this is not necessary), distinct from that containing the bond, contract or other evidence of the demand for which the judgment is confessed, and it must be produced to the officer signing the judgment and filed with the clerk of the court in which the judgment is entered at the time of the filing and docketing of such judgment. * * * Within a year and a day from the date of the warrant of attorney judgment may

be entered up as of course, without the leave of court." (Graham's Practice, chap. 4, p. 467 *et seq.*)

I have been unable to find any rule or precedent in this country or England requiring a power of attorney to confess judgment, to be acknowledged, or even to be attested by a subscribing witness. The Code of Procedure effected a change in the mode of procedure and reinstated the practice of combining in one instrument the authority for a judgment and the proof of debt, and described the process as judgment by confession. By that Code a party could confess judgment either for money due or to become due, or to secure a person for contingent liability on behalf of the defendant. To do this the defendant was required only to make a statement in writing, signed and verified by him, naming the amount for which judgment might be entered, and authorizing its entry and stating, concisely, the facts out of which the liability arose. Upon filing this statement with the clerk of the court, he was required to enter the judgment for the amount confessed, with five dollars costs and disbursements, and the statement and affidavit, with judgment indorsed thereon, became the judgment-roll.

It is thus apparent that under the practice now existing in this state judgments are daily entered in our courts without process, declaration or appearance, and without the intervention of the court or even an attorney and without proof of any authority from the defendant except that inferred from his signature to the statement.

This brief historical statement of the condition of the law on the subject in this state, will have failed in its purpose if it does not show that heretofore the filing in court of a warrant of attorney, authorizing the confession of a particular judgment, gave the court jurisdiction over the person of the party executing it to adjudicate according to its regular practice upon the subject embraced in the warrant. When the warrant is for the confession of judgment for a specific sum, it is, of course, unnecessary to prove the nature, existence or amount of the debt upon the assessment of damages, as the

express authority of the warrant supplies the place of such proof.

And, as it is held in Pennsylvania, on a warrant authorizing any attorney to confess judgment, the prothonotary may properly be considered such attorney. There would seem to be no valid reason why this should not be so, as the warrant authorizes the plaintiff to select any attorney he may desire, and the exercise of that authority is, at the most, a mere matter of form. Judgment is entered there as here, on the request of the plaintiff, by the clerk, without the intervention of the judge, in term time or vacation, and in case the debt is not then due, execution is stayed until it matures. The only material difference existing between the present practice in this state and in Pennsylvania in relation to judgments by confession is, that here a defendant is required to verify his statement as to the nature and circumstances of the indebtedness. This requirement has no relation, however, to the jurisdiction of the court or the authority of the clerk to enter judgment, as its only purpose has frequently been declared to be to protect creditors from judgments fraudulently confessed by an insolvent debtor. (*Shelden* v. *Stryker*, 34 Barb. 121; *Chappel* v. *Chappel*, 12 N. Y. 219; *Dunham* v. *Waterman*, 17 id. 9.)

In the latter case, Judge SELDEN says: "The object of the statute being to protect the creditors of the party confessing the judgment against fraud, its violation forms a proper subject of equitable jurisdiction." In the case of *Sheldon* v. *Stryker* (*supra*), Judge EMOTT says, in view of the principles declared in the cases of *Chappell* and *Dunham*, above cited, that such judgment is not "an absolute nullity if it is valid as to any person. It is valid as to the defendant in the judgment, for he cannot even move to set it aside, and such judgments are always amended as to him." It was, therefore, held that a judgment entered by confession, although it be not confessed in conformity with the provisions of the Code, is not absolutely void, but is voidable at the instance of certain creditors only.

Statement of case.

In view of these decisions it would be idle to contend that a defendant can impeach a judgment entered upon a warrant of attorney, signed by him and in conformity thereto, whether his statement be verified or acknowledged or not. It is not easy to point out any difference in principle between the practice now prevailing in this state and that pursued in Pennsylvania. Given a valid warrant of attorney in either state, the rest is matter of form, to be regulated by the laws of the respective states where the cause of action arises.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

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128 403
131 349

ORRIN G. STAPLES, Respondent, *v.* COPLEY A. NOTT, Impleaded, etc., Appellant.

In an action upon a promissory note dated at Washington, D. C., made payable at a bank in the state of New York, which bore interest at a rate legal in the place of its date, but illegal in this state, it appeared that the note was given to take up another note dated at Washington and payable there, which bore the same rate of interest and was similarly indorsed. The arrangement for renewal was made in Washington where the note in suit was drawn; it was handed to the maker to execute, he took it to his home in New York where he signed it and the defendant N. indorsed it. The note was then mailed to plaintiff at Washington. The indorser set up usury as a defense. *Held*, untenable; that as the contract of the parties, evidenced by the note, was made in, it was governed by the laws of the District of Columbia; that the affixing of their signatures by the maker and indorser were simply details in the performance and execution of the contract which was consummated when the note was received by plaintiff; that the naming of a New York bank as the place of payment did not characterize it as a New York contract; and that while the engagement of the indorser was, in a sense, independent of that of the maker, this did not affect the local character of the contract.

(Argued June 25, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 25, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court.

Statement of case.

The nature of the action and the facts, so far as material, are stated in the opinion.

M. M. Waters for appellant. Upon the whole evidence the court erred in holding that as matter of law both the note and contract by indorsement were not New York contracts. (*Everette* v. *Vendryes*, 19 N. Y. 436; *Hyde* v. *Goodnow*, 3 id. 267; *H. N. Bank* v. *LaCombe*, 84 id. 367, 378; 17 Johns. 510; 84 N. Y. 378; 88 id. 367; *Aymar* v. *Sheldon*, 12 Wend. 443; 1 Pars. on Cont. 276; *Dickinson* v. *Edwards*, 77 N. Y. 576; *Clayes* v. *Hooker*, 4 Hun, 231; *Jewell* v. *Wright*, 30 N. Y. 259; *Bowen* v. *Newell*, 13 id. 290; *Hildreth* v. *Shepard*, 65 Barb. 265; *H. N. Bank* v. *Rea*, 64 id. 175; *Baline* v. *Wombough*, 38 Barb. 352; *Sherrill* v. *Hopkins*, 1 Cow. 103; *Chapman* v. *Robertson*, 6 Paige, 627; *LeBreton* v. *Miles*, 8 id. 261; *Bank of Com.* v. *R. R. R. Co.*, 10 How. Pr. 1; Bishop on Cont. § 1882; *Warner* v. *Jaffray*, 96 N. Y. 248; *Sheldon* v. *Haxton*, 91 id. 124; *Edgerly* v. *Bush*, 81 id. 199; *Dyke* v. *E. R. R. Co.*, 45 id. 119; *Martin* v. *Hill*, 12 Barb. 621; 2 Kent, 460; *Lee* v. *Selleck*, 33 N. Y. 612, 615; *A. Bank* v. *P. Bank*, 41 Barb. 601; *Musson* v. *Lake*, 4 How. [U. S.] 262; *Brabston* v. *Gibson*, 9 id. 263.) The promissory note set forth in the complaint is a contract whereby more than six per cent per annum is contracted to be reserved and taken for the loan, use and forbearance of money, and as such it is void for usury, if it is a New York contract. (2 R. S. 772, § 5; *Dickinson* v. *Edwards*, 77 N. Y. 576; *Sheldon* v. *Haxton*, 91 id. 131; *W. C. Bank* v. *Low*, 81 id. 566; *D. I. Co.* v. *Foote*, 16 Fed. Rep. 262.)

John C. McCartin for respondent. The note in suit, being given in renewal of a valid debt owing by defendants, residents of this state, to plaintiff, a resident of the District of Columbia, in pursuance of an agreement there made, and at a rate of interest valid in the District of Columbia, it is not rendered invalid by reason of being signed in this state, or payable here. (*A. N. Bank* v. *Sheffield*, 4 Hun, 421; *Tilden*

v. *Blair*, 21 Wall. 241; *W. C. S. Bank* v. *Low*, 81 N. Y. 566; *W. T. & C. Co.* v. *Kilderhouse*, 87 id. 431; *Lee* v. *Sellick*, 33 id. 615.) The maker being the principal debtor, or primarily liable on the note, and the indorser surety, the surety has no separate standing in respect to the defense of usury. (*Stewart* v. *Bramhall*, 74 N. Y. 87; *U. N. Bank* v. *Wheeler*, 60 id. 612.) It was the duty of the defendant to allege and prove all the facts which he relied upon to establish usury. (*Manning* v. *Tyler*, 21 N. Y. 567; *W. T. & C. Co.* v. *Kilderhouse*, 87 id. 435.) There was no error in directing a verdict for the plaintiff. (*Dillon* v. *Cockcroft*, 90 N. Y. 649; *Ormes* v. *Dauche*, 82 id. 443; *Kocheler* v. *Adler*, 78 id. 287.)

GRAY, J. The promissory note in suit bears date at Washington, D. C., April 5, 1889; was made payable at a bank in Watertown, N. Y., and carried interest at the rate of seven per cent per annum. The appellant was indorser upon it, and defends on the ground of usury. If the contract of the parties, which is evidenced by this note, was governed by the laws of this state, the defense should have prevailed; but if made under the laws of the District of Columbia the judgment was right and should be sustained.

The note was given in renewal of a balance due upon a prior note, made by and between the same parties, which bore date at Washington, D. C., April 5, 1888; was payable one year after date at a bank in Washington; bore the same rate of interest and was similarly indorsed. Some payments were made on account of the principal, but, before its maturity, the maker requested of plaintiff, a resident of Washington, by letter, to renew for the balance remaining due. Failing to receive any reply, he went on to Washington and there prevailed upon the plaintiff to agree to take a new note for his debt. This note was then drawn by the plaintiff and handed to the maker for execution, who took it back to his home in Syracuse, N. Y., where his and the appellant's signatures were affixed, as maker and indorser respectively. It had been agreed with the plaintiff that, upon this new note being

returned to him, he would send back the original note, and the appellant himself mailed the renewal note to the plaintiff in Washington.

These facts, which were not disputed, should make it perfectly obvious that there was here every essential to a valid contract under the laws of the plaintiff's domicile, and the only accompaniment lacking to a full local coloring was the foreign place named for payment. For the affixing of the signatures to the note by the maker and the indorser, however important as acts, was, yet, but a detail in the performance and execution of the contract which had been agreed upon with the plaintiff. But naming a New York bank as the place where the maker would provide for the payment of the note, did not characterize the contract in one way or the other. That arrangement was one simply for the convenience of the maker. It could have no peculiar effect. The transactions, which resulted in an agreement to extend the time for the payment of the debt and to accept a new note, took place wholly in the District of Columbia, and what else was enacted in the matter elsewhere neither added to nor altered the agreement of the parties. Though the engagement of the indorser, in a sense, was independent of that of the maker, that proposition is one which does not affect the local character of the contract, but which simply concerns the question of the enforcement of the indorser's liability. Whatever the previous knowledge of the appellant, as to the negotiations and the agreement for a renewal of the promise to pay between the maker of the old note and the plaintiff, the question is without importance. When he indorsed the note, which had been prepared and was brought to him, and sent it through the mail to the plaintiff, his engagement was with respect to a contract validly made according to the laws of the District of Columbia, and when the note was received by the plaintiff the transaction was then consummated in that place. In *Lee* v. *Selleck* (33 N. Y. 615) it was said, with respect to an indorsement in Illinois of a note made in New York, that the fact of the indorser writing his name elsewhere was of no moment.

Upon delivery by his agent to the plaintiffs in New York, it became operative as a mutual contract.

The agreement, which was made in Washington for the giving of the promissory note in question, was the forbearance of a debt already due, upon which the appellant was liable; and the renewal of his engagement as indorser upon the note, without any qualification of his contract of indorsement, was in fact an act in ratification and execution of the previous agreement. That agreement between the plaintiff and the maker in Washington took its concrete legal form in a note, prepared there by the plaintiff, with a rate of interest sanctioned by the laws of his domicile, adopted by the appellant by indorsement in blank, and made operative as a mutual contract by delivery to plaintiff in Washington through the mails.

For the court to hold, because the note was not actually signed and indorsed in the District of Columbia, where the agreement, it evidenced, was made, or because it was made payable in another state, that the contract was void as contravening the usury laws of the place of signature and of payment, would be intolerable and against decisions of this court. (*Wayne Co. Sav. Bank* v. *Low*, 81 N. Y. 566; *Western T. & C. Co.* v. *Kilderhouse*, 87 id. 430; *Sheldon* v. *Haxtun*, 91 id. 124.)

I think the plaintiff was entitled to recover, as upon a contract made under the government of the laws of the District of Columbia and, therefore, valid and enforceable in any state.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

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j 160 216

In the Matter of the Application of THE SPLIT ROCK CABLE ROAD COMPANY to Acquire Real Estate of CHARLES HUGHES et al.

A contemplated possible limited use by a few, and not then as a right but by way of permission or favor, is not a public use, and so is not sufficient to authorize the taking of private property against the will of the owner.

Upon an application to appoint commissioners to appraise private property sought to be acquired by a corporation organized under the act of 1888 (Chap. 462, Laws of 1888), which authorizes the formation of elevated tramway corporations for the transportation of freight and the condemning of private lands for the corporate purposes, these facts appeared: The petitioner's articles of association state that it was formed for the purpose of constructing maintaining and operating an elevated tramway between two points specified, "a distance of about four miles." The map originally filed, and the only one filed, did not include the lands in question. The tramway had been built and was in operation for a distance of about three and one-half miles. One of the termini was upon the lands of a manufacturing corporation, the other upon the lands of the petitioner, near the manufactory of said corporation. The incorporators of the petitioner were stockholders, interested in said corporation, and the petitioner was organized and thus far has been operated exclusively as an instrumentality to facilitate the business of the corporation. The lands sought to be acquired were to increase the petitioner's terminal facilities at the northern terminus of its road. There is no public highway leading to this terminus. All that was claimed by the petitioner was that the surplus of the capacity of the road, after supplying the wants of said manufacturing corporation, was to be let to some one individual engaged in selling coal, to be used in transporting that article. As to whether there would be any such surplus or whether it could be availed of by the public, did not appear. It also appeared that the petitioner had lands which could be used for the purpose for which the land in question was desired, but not as conveniently. *Held*, that the use for which the land was sought to be acquired was not public, but private, and that the petitioner's application was properly denied.

Reported below, 58 Hun, 351.

(Submitted June 25, 1891; decided October 6, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made December 6,

Statement of case.

1890, which reversed an order of Special Term appointing commissioners of appraisal and dismissed the proceedings.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

William G. Tracy for appellant. The taking of private property for the purpose of an elevated tramway of this description, is a taking for a public use within the principles established by the courts of this and other states. (*B., etc., R. R. Co.* v. *Brainard*, 9 N. Y. 100; *N. F. R. R. Co.* v. *De Veaux*, 108 id. 221; Mills on Em. Domain, §§ 12, 13, 161; *B. G. Co.* v. *Richardson*, 63 Barb. 437; *O'Reilly* v. *K. V. Co.*, 32 Ind. 169; *Coster* v. *T. W. Co.*, 18 N. J. Eq. 54; *Phillips* v. *Watson*, 63 Iowa, 28; *Talbot* v. *Hudson*, 16 Gray, 417; *Harvey* v. *Thomas*, 10 Watts, 68; *Hays* v. *Risher*, 32 Penn. St. 169; *Bankhead* v. *Brown*, 25 Iowa, 540; *N. Y. C. R. R. Co.* v. *M. G. L. Co.*, 63 N. Y. 326; *Clarke* v. *Blackmar*, 47 id. 150; Laws of 1878, chap. 203.) Lands adjacent to the proposed route of an elevated tramway convenient for terminal facilities may be condemned as required for the purposes of incorporation. (*Hannibal & S. J. R. R. Co.* v. *Mader*, 49 Mo. 165; *C. B. & A. R. R. Co.* v. *Wilson*, 17 Ill. 123; *H. R. R. Co.* v. *Kip*, 46 N. Y. 546; *In re N. Y. C. & H. R. R. Co.*, 77 id. 248; *N. Y. C. & H. R. R. R. Co.* v. *M. G. Co.*, 63 id. 329; *In re Bushwick Ave.*, 48 Barb. 9; *Gisey* v. *C. W. & Z. R. R. Co.*, 4 Ohio St. 308.) The finding of the court, made at appellant's request, that the Split Rock Cable Company has filed no map indicating their route extended over respondent's lands, does not prevent the condemnation of the property in question. (Laws of 1888, chap. 462, § 7; Laws of 1850, chap. 140, § 22; *In re S. B. R. Co.*, 53 Hun, 161.) None of the findings of fact made by the court at the request of the appellant require the reversal of the order appealed from. (*Nobis* v. *Pollock*, 53 Hun, 441.) It was incumbent upon the petitioner to establish that the use was a public one, and that the land was required in the operation of its business, and these facts could only be established by parol proof. (*N.*

Statement of case.

F. W. R. Co. v. *De Veaux*, 108 N. Y. 375.) Where the char acter of a transaction depends upon the intent of the party who performs it, such party may testify to his intention and purpose. (*Seymour* v. *Wilson*, 14 N. Y. 567; *Kenyon* v. *Luther*, 19 N. Y. S. R. 32; *Thurston* v. *Cornell*, 38 N. Y. 281; *Pritchard* v. *Hirt*, 39 Hun, 378.) The evidence given by King was sufficient to show that the road was intended for public use. (*N. W. Co.* v. *De Veaux*, 108 N. Y. 375.)

Thomas Hogan for respondent. It was error for the court to deny the motion to dismiss the proceedings. The act under which the appellant was incorporated imposed no public duties or obligations upon it, and consequently the public would have no right to use the petitioner's tramway. (2 R. S. 1738, § 1; Laws of 1888, chap. 467, § 1; *In re N. Y., L. & W. R. R. Co.*, 99 N. Y. 12; *B. & N. Y. R. R. Co.* v. *Brainard*, 9 id. 100; *In re Eureka*, 96 id. 41.) The petitioner corporation was not adapted to serve any public use. (*People* v. *P. D. Co.*, 11 Col. 147; *In re R. H. & L. R. R. Co.*, 110 N. Y. 119; *Scholl* v. *G. C. Co.*, 118 Ill. 427; *In re S. B. R. R. Co.*, 119 N. Y. 141.) Aside from the character of the petitioner's structure, not being a public use and not adapted for a public use, the evidence shows that it was not intended, in fact, for a public use. (Pierce on Railroads, 144; *In re D. C. Assn.*, 66 N. Y. 569; 99 id. 12.) The alleged purposes for which the appellant sought to condemn the respondents' lands were also contingent and uncertain. (*R. & S. R. R. Co.* v. *Davis*, 43 N. Y. 145; 47 N. J. L. 43, 518.) The petitioner was not entitled to condemn the lands of respondents because they filed no map, as required by the General Railroad Act. (*People ex rel.* v. *T. A. R. R. Co.*, 112 N. Y. 402; *In re A. R. E. R. Co.*, 123 id. 351; Laws of 1888, chap. 462, § 7; *In re P. B. Co.*, 108 N. Y. 483; *In re Thompson*, 57 Hun, 119; *In re B. H. W. R. R. Co.*, 10 Abb. [N. C.] 104; *In re N. Y. & B. R. R. Co.*, 62 Barb. 85.) The attempt on the part of the Solvay Process Company, under the statute and through the instrumentality of the subordinate corporation, to take the lands of

the respondents under a pretense of a public use, was a fraud upon the respondents and upon the court, and a perversion of the purposes of the statute. (*Fanning* v. *Osborne*, 102 N. Y. 441; *N. Y. & H. R. R. Co.* v. *Kipp*, 46 id. 553.) The petitioner in this case did not establish the fact that it endeavored to purchase the property before attempting to condemn it. (*In re E. B. W. & M. Co.*, 96 N. Y. 42; *In re N. F. & W. R. Co.*, 108 id. 375.) The purpose for which they pretended to need this land is to run surface cars. This is not within the purposes of the incorporation and power to condemn lands for such purposes is not given by the statute. (112 N. Y. 396; 12 N. Y. Supp. 506, 514; *Harding* v. *Goellett*, 3 Yerg. 41; *Atty.-Gen.* v. *Eau Claire*, 37 Wis. 400; *Sadler* v. *Laughlan*, 34 Ala. 302.) The lands are not at all necessary for the Split Rock Cable Company. (*In re R. & G. H. R. Co.*, 12 N. Y. Supp. 566.) When a party seeks to condemn lands two things must be shown: First, legislative warrant for the taking; and second, when the right is challenged that it is taken for a public use. (*In re N. F. & W. R. Co.*, 108 N. Y. 375, 383; 112 id. 405; *People ex rel.* v. *Newton*, Id. 396; *In re S. B. R. R. Co.*, 119 id. 141; *Astor* v. *A. R. Co.*, 113 id. 93; *In re E. B. N. & M. Co.*, 96 id. 42; *R. R. R. Co.* v. *Davis*, 43 id. 137; *In re N. Y. & C. R. R. Co.*, 1 Hun, 496; *In re D. C. Assn.*, 66 N. Y. 569; *C. E. I. P. R. R. Co.* v. *Wiltsie*, 116 Ill. 449; 118 id. 427; *People* v. *P. D. Co.*, 11 Col. 147; *Varner* v. *Martin*, 21 N. Y. 534; 70 Penn. St. 210; 79 id. 257; 51 Cal. 269; 31 W. V. 710; *In re R. H. & L. R. R. Co.*, 110 N. Y. 119; *In re R. E. R. Co.*, 123 id. 351.)

O'BRIEN, J. The Split Rock Cable Road Company, a corporation organized under chapter 462 of the Laws of 1888, entitled "An act to authorize the formation of elevated tramway corporations and to regulate the same," applied by petition to the Supreme Court for authority to take for its corporate use certain lands of which the respondents are the owners. The right to take these lands was contested by the owners on several grounds, among them, that the use for which they were

required by the corporation was not public. The Special Term granted the application and directed the appointment of commissioners to appraise the value of the property, and this order has been reversed by the General Term. There are some questions of minor importance, such as the omission of the petitioner to file a map, and the present necessity for acquiring the lands for any purpose that, in our view, need not be considered. The prominent question is whether the application is for the taking of private property for a public use in fact or for a purpose merely private. The provisions of the statute under which the petitioner is incorporated, so far as they are material to the question, are as follows:

"§ 1. Any number of persons, not less than thirteen, may form a company for the purpose of constructing, maintaining and operating an elevated tramway, constructed of poles, piers, wires, rods, ropes, bars or chains, for the transportation of freight in suspended buckets, cars or other receptacles for hire, and for that purpose may make and sign articles of association in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the said tramway is to be constructed, maintained and operated, and the length of said tramway as near as may be."

The particular powers which such corporation may possess and exercise are enumerated and specified in the following provisions:

"§ 6. Every corporation formed under this act shall have power and authority:

"1. To cause such examination and surveys for its proposed tramway to be made as may be necessary to the selection of the most advantageous route; and for such purpose by its officers and servants to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

"2. To lay out its tramway and to construct the same as hereby provided.

"§ 7. In case any company formed under this act is unable to agree for the purchase, use or lease of any real estate required

for the purposes of its incorporation, it shall have the right to acquire title in fee to the same in the manner and by the proceedings provided by law for acquiring title to lands for railroad use, by railroad corporations, under the provisions of chapter 140 of the Laws of 1850, and the several acts amending the same, supplemental thereto, so far as the same are applicable.

"§ 9. Every corporation formed under this act shall have power and authority to erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and transaction of its business."

The articles of association of the petitioner, which are acknowledged June 13, 1888, and filed June 19, 1888, state that the subscribers "have associated together as an elevated tramway corporation, to continue in existence for the period of fifty years, for the purpose of constructing, maintaining and operating an elevated tramway between Split Rock and Onondaga Lake, a distance of about four miles, both of which places are in Onondaga county."

The capital stock of the petitioner was all paid in, and in June 1889, it completed its tramway from Split Rock northerly to near the Erie canal a distance of about three and a half miles, and since then it has been in operation. The tramway consists of two elevated cables, held upon supports and parallel to each other, about ten feet apart, on which run buckets by means of a trolley or pulley, one line taking the buckets that have been filled, and the other line taking back the buckets which are empty. The location of the southern terminus of this tramway is upon the land of the petitioner, just north of the lands now desired to be taken, and is in a gorge about 90 feet lower than the Hughes land.

There is nothing in the statute under which the corporation was formed nor in the objects of the corporation as expressed in the articles of association sufficient to warrant the conclusion that the business which it is organized to carry on is public in the sense that enables it to take private property under the power of eminent domain. The Special Term, however, found

as matter of fact that the lands required by the corporation and described in the petition were for a public use, and it remains to inquire whether the General Term was right in holding, as it did, that this finding was without evidence to support it. The facts and circumstances from which the nature of the use to which the corporation proposes to apply the property sought to be condemned, are practically undisputed. The company has filed no map indicating an intention in any way to include the land in question within the boundaries of its property, a fact which, standing alone, would form a very serious obstacle to the success of the application. (*Matter of the Rochester Electric Railway Company*, 123 N. Y. 351.)

The map of its route originally filed, taken in connection with the evidence, shows that the southern terminus of the tramway is upon the land of the petitioner and near the establishment of the Solvay Process Company, a corporation engaged in a large and growing business, consisting, as is to be inferred from the evidence, in the production of soda ash. This company owns one hundred acres of land upon which are stone quarries, and this land entirely surrounds the terminus of the tramway as well as the land in question. The northern terminus of the tramway as now built is also on the lands of the Solvay Process Company at the lime-kiln of their works, about 500 feet from the Erie canal. The incorporators of the petitioner were practically all stockholders and persons interested in the Solvay Company, and it is quite apparent that the petitioner was organized and is operated as an instrumentality to facilitate the business operations of the Solvay Company. The only business that it has thus far carried on was for that company. As now constructed the limit of its carrying capacity cannot exceed 750 tons per day. It has thus far been operated practically night and day, and has succeeded in carrying for the Solvay Company 350 to 400 tons of stone a day. There is no public highway leading to the northern terminus of the road by means of which the public can obtain access for its use; that the road has thus far been entirely for the benefit of

the Solvay Company, and that its business is to be entirely subordinate in the future to the plans and interests of the same company is entirely clear. From the evidence of the president of the petitioner and other witnesses in support of the application the most that is claimed is that the surplus of the capacity of the road, after supplying the wants of the Solvay Company, is to be devoted to public use in carrying, in buckets, freight offered to it by any person, providing such freight is suitable to the buckets and the road. Whether there is to be any surplus capacity as the Solvay Company continues to expand its business, and, if so, how much, are questions which are left entirely uncertain. / From the testimony, it appears that the lands are required in order to increase the terminal facilities of the tramway company by building other tramways on the surface to facilitate the carrying of stone to the cable station, by erecting buildings for the storage of freight and for repair shops, and to furnish means of access. The company has other lands that could be used for these purposes, but it is not so convenient. The evidence does not suggest any business that the petitioner is to carry on in the future any more than in the past, beyond the carrying of stone for the Solvay Company, except, possibly, the carrying of coal. In regard to that, it is best to describe the project in the language of the president himself, who said: "We intend to make a contract with some private individual to furnish him with coal, so that he can transport it or sell it to people in that vicinity; to establish a coal yard the same as anywhere, not that the Solvay Process Company or the cable company will establish a coal yard; some individual will have to run it, with whom we will make a contract to carry coal, and we propose to limit the contract to one individual for the present." Looking at the statute under which the petitioner was incorporated, the object of its incorporation as described in the certificate and the evidence in regard to the manner in which it has been and is to be operated and the purpose of its corporate existence, we think it is entirely clear that the use to which the petitioner is to devote the lands of the respondents is not public, but private. The

Statement of case.

principles governing applications by corporations of this character to take private property for its corporate purposes, have been very fully discussed and stated in a recent case in this court. (*Matter of Niagara Falls & Whirlpool Ry. Co.*, 108 N. Y. 375.)

Under the doctrine of this and other cases, a possible limited use by a few, and not then as a right but by way of permission or favor, is not sufficient to authorize the taking of private property against the will of the owner. (*Matter of Deansville Cemetery Assn.*, 66 N. Y. 569; *Matter of Eureka Basin Warehouse & M. Co.*, 96 id. 42; *Matter of Rochester, Hornellsville & Lack. R. Co.*, 110 id. 119; *Matter N. Y., L. & W. Ry. Co.*, 99 id. 12.)

The order appealed from is right, and should be affirmed, with costs.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* REUBEN TANNER, Respondent.

Where language is used in a statute which has a natural and legitimate office to perform, a construction which will create a criminal offense when none is expressed, is not justified.

In an action to recover a penalty for an alleged violation of the provision of the statute in relation to fishing with nets in the fresh waters of this state (§ 23, chap. 534, Laws of 1879, as amended by chap. 127, Laws of 1884), which prohibits the catching or killing of any fish, with certain exceptions, among which are "suckers," in any way except by angling with a hook and line, in any of the fresh waters of the state, except certain places named, among which W. creek was not included, it was claimed that defendant had caught suckers with a net in W. creek, and had thereby rendered himself liable to the penalty prescribed by the statute; that the court should strike out the word suckers from the exceptions in the prohibitory clause, as in no other way could effect be given to certain other clauses in the form of exceptions contained in the statute, which provide that, in waters specified, it shall be lawful for certain persons to possess and fish for suckers with a seine or spear during certain months. *Held*, untenable; that the purpose of the clauses referred to was simply to limit and restrict, in the places named, the license to catch suckers given by the general exception.

Statement of case.

The complaint also demanded the penalty imposed by said statute (§ 23) upon one having a net in his possession on the shores of waters inhabited by black or Oswego bass. The only proof introduced by plaintiff to show that the creek was inhabited by said bass, was that of a witness, who testified that he had once caught them therein, above the dam, which is near a river inhabited by them, and into which the creek empties. Defendant proved by several witnesses, who had fished in W. creek for many years, that they had never caught any of said bass in the creek, or seen any that had been caught there. The question was submitted to the jury and they found in favor of defendant. *Held*, no error.

(Argued June 19, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1891, which affirmed a judgment in favor of defendant entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

Martin Heermance for appellant. The catching of suckers was within the prohibition of the statute. (Laws of 1879, chap. 534, § 23; Potter's Dwarris on Stat. 128.) Where acts are *in pari materia*, if the same words be used in both statutes, a distinction made in one is a legislative exposition of the sense in which it is to be understood in the other. (Potter's Dwarris on Statutes, 247; Laws of 1887, chap. 620, § 1.)

Joseph Morschauser for respondent. The findings of a jury upon conflicting testimony, will not be disturbed even though the appellate court might think otherwise. (*Cullen* v. *N. S. M. R. Co.*, 46 Hun, 562; *Thorn* v. *Beard*, 14 N. Y. Supp. 339.) The statute being of a penal nature, should be strictly construed. (*People* v. *Belknap*, 12 N. Y. Supp. 145; *Benton* v. *Wickwire*, 54 N. Y. 226; *Hall* v. *Siegel*, 7 Lans. 207; *Delafield* v. *Brady*, 108 N. Y. 524.) Courts cannot correct supposed errors, omissions, or defects in legislation. (*McClusky* v. *Cornwell*, 11 N. Y. 431; *People* v. *Potter*, 49 id. 385.) The statute should be read as a whole, it being ambiguous and uncertain, and the exceptions noted. (*People ex rel.* v. *McClave*, 99 N. Y. 89; 53 id. 233.) The costs

were properly awarded against the county of Dutchess. (*People* v. *Alden*, 112 N. Y. 217.)

RUGER, CH. J. This appeal calls for a construction by the court of the meaning of section 23 of chapter 534 of the Laws of 1879, as amended by chapter 127 of the Laws of 1884, relating to the subject of fishing in the fresh waters of the state with nets and other devices. The action is brought for the recovery of two penalties for a violation of the provisions of section 23 and 24, respectively, of the act referred to. The prohibitory portion of section 23, claimed to have been violated, reads as follows: "No person shall kill or catch, or attempt to kill or catch any fish except minnows, bullheads, eels, *suckers* and catfish, in any of the fresh waters of this state, or in the American waters of the St. Lawrence river, in any way or manner, or by any device whatever, except that of angling with a hook and line, save only in the following waters: the Hudson river below the dam at Troy." (And some other places, not including Wappinger creek). "Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and in addition thereto shall be liable to a penalty of twenty-five dollars for each and every such offense."

It is claimed by the appellant that the defendant made himself liable to a penalty by catching suckers with a net in Wappinger's creek, Dutchess county, although such fish are expressly excepted from the prohibitory clause of such section. The appellant claims that the court should strike out the word "suckers" from the exceptions to the prohibitory clause, and read it as though the taking of "suckers" with a net was prohibited in all the fresh waters of the state, save those therein especially excepted.

We know of no rule of construction which authorizes a court to reverse the plain meaning of a penal statute and read it so as to condemn that as a criminal act which it expressly declares to be lawful. The theory upon which the appellant's claim is based is that in no other way can effect be given to certain exceptions in the section, and that inasmuch as the settled rules of interpretation require that some meaning should be ascribed

to all of the language of a statute, that it can be accomplished in no other way except by striking out the word suckers from the list of fish excepted. The expressions referred to are contained in the numerous and complicated exceptions to the operation of the prohibitory clause, and read as follows: "And also except in the waters of the Walkill river, in the county of Ulster, wherein it shall be lawful for any person or persons of one and the same family or household to possess and fish for suckers and eels in the waters of said river during the months of March and April and October and November, with a single fyke, the meshes of which shall not be less than one inch. * * * Provided, further, that in Black lake, Mud lake and Yellow lake, in St. Lawrence county, bullheads, eels, suckers, catfish and pickerel may be killed with a spear, except in the months of March, April and May." The appellant contends that these exceptions are meaningless if there is a general exception of the taking of suckers in the waters named.

The rule of construction contended for would lead to a manifest absurdity, as it would radically reconstruct the prohibitory clause and leave it inoperative, except as to minnows alone. The plain meaning of the material part of the section is attempted to be reversed through a reference to certain clauses clearly intended for another purpose. It seems quite plain that the clauses referred to were inserted for the purpose of limiting and restricting the exception of suckers, in the places specially referred to, from the operation of the general license to catch such fish. They have a natural meaning and effect by applying them to the waters mentioned, for the purpose of authorizing a restricted privilege only to fish in such places for the classes of fish therein mentioned. In the absence of these clauses the exceptions to the prohibitory clause would give unrestricted license for fishing in these waters, but the limitations contained in the quoted clauses make that a limited privilege, which without it was unrestricted.

The language used thus, having a natural and legitimate office to perform, does not justify the application of a rule of construction which would create a criminal offense where none was expressed, and probably none was intended.

Statement of case.

A second count in the complaint demands a penalty against the defendant for violating section 23 of the act of 1879, in having a fish net in his possession on the shores of waters inhabited, among other kinds of fish, by black or Oswego bass.

The trial court submitted the question to the jury to determine whether Wappinger's creek was inhabited by the fish mentioned, and they found that it was not. It is claimed by the appellant that this finding was not supported by the evidence.

The only material evidence in the case showing that Wappinger's creek was inhabited by black bass was that of a single individual who lived near the mouth of the creek, and who testified that he had caught black bass in the creek above the dam. It is inferable from this evidence that the witness lived on the creek near the Hudson river, into which it empties, and which is inhabited by bass, and that he caught such fish near that river on a single occasion. This sporadic instance is far from proving that the creek was inhabited by such fish. There was opposed to this evidence the testimony of a number of witnesses who had frequently fished in Wappinger's creek for a long series of years, and who had never caught any bass in the creek or seen any that were caught therein.

The weight of evidence on this question was, we think, with the defendant, and the jury were authorized in so finding.

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

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LYMAN F. HURLBURT et al., as Administrators, Appellants, *v.* ELLA A. HURLBURT, as Administratrix, Respondent.

The provision of the Code of Civil Procedure (§ 835) prohibiting an attorney from disclosing professional communications made to him by his client does not apply, as between the parties, to communications made by two or more persons in consultation with an attorney for their mutual benefit; it cannot be invoked in any litigation which may thereafter arise between such persons, although *it seems* it may in a litigation between them and a stranger.

Statement of case.

Where testimony of the attorney as to communications so made would have been competent in an action between such persons, it is also competent in an action between their personal representatives as such; and this, although the parties to the latter action are personally interested.

The declarations of a testator or intestate, binding him or binding and impairing his estate, may be given in evidence against his personal representatives, in all cases where they would have been competent against himself, if he had been living and a party to the action.

The mere intimation of an opinion by a judge upon the evidence or upon the merits of the case, or his comments upon the evidence, although unfavorable to one of the parties, while it may be ground for setting aside the verdict on motion, furnishes no ground for a reversal in this court, where the case was submitted to the jury upon a charge which laid down no improper rule of law.

Where the court below has refused to set aside the verdict and has affirmed the judgment entered thereon, in the absence of any errors of law properly excepted to, the case is not reviewable here.

(Argued October 6, 1891; decided October 13, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered June 2, 1890, which denied a motion for a new trial made by plaintiffs on exceptions ordered to be heard in the first instance at General Term, and directed judgment on a verdict in favor of defendant.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles McLouth for appellant. It was error for the court to permit David S. Aldrich, an attorney and counsellor, to state the conversation that took place between plaintiff's intestate and him, as the communications made to him were privileged. (Code Civ. Pro. § 835; *Bacon* v. *Frisbie*, 15 Hun, 26; 80 N. Y. 394; *Root* v. *Wright*, 84 id. 72; *Gates* v. *Olmstead*, 56 id. 632; *Williams* v. *Fitch*, 18 id. 551; *Britton* v. *Lorenz*, 45 id. 51; *People* v. *Graham*, 63 Barb. 483; *Loder* v. *Whelpley*, 111 N. Y. 48, 239; *Halcomb* v. *Halcomb*, 95 id. 316; *In re O'Neil*, 7 N. Y. Supp. 107; 27 Hun, 331; 40 id. 91; *Grattan* v. *M. Ins. Co.*, 60 id. 281; *Edington* v. *M. L. Ins. Co.*, 67 id. 185; *Weston* v. *A. L. Ins. Co.*, 2 How. [N.

C.] 184; 99 N. Y. 56; Rapalje on Witnesses, § 271.) The court erred in admitting declarations of plaintiff's intestate that were not material to the issue being tried. (*Stephens* v. *Vrooman*, 16 N. Y. 381, 384; 61 Barb. 294; 47 id. 384.) The court erred in permitting the witness, Mrs. Langdon, to contradict Lyman Hurlburt as to a matter immaterial and collateral. (Rapalje on Witnesses, §§ 203–209; *Crouse* v. *Fitch*, 1 Abb. Ct. App. Dec. 475; 6 Abb. [N. S.] 185; 14 Abb. Pr. 346; 23 How. 350.) The exceptions to the charge, as to specific subjects, expressions of the trial judge, subjects spoken of, and the evidence given by certain witnesses upon certain matters, are pointed out with all the particularity that can be done. (*People* v. *Livingston*, 79 N. Y. 279; *McGinly* v. *U. S. L. Ins. Co.*, 77 id. 495.)

S. B. McIntyre for respondent. The declarations of an intestate are always admissible against his administrator, or any other claiming in his right. (1 Greenl. on Ev. § 189; *Schenck* v. *Warner*, 37 Barb. 258; *Sherman* v. *Scott*, 27 Hun, 331; *Whiting* v. *Barney*, 30 N. Y. 330; *Root* v. *Wright*, 21 Hun, 347; *Hebbard* v. *Hanghian*, 70 N. Y. 54; *Rosenberg* v. *Rosenberg*, 40 Hun, 91; *Brennan* v. *Hall*, 14 N. Y. Supp. 864; *Earl* v. *Lefler*, 46 Hun, 9; *Quinby* v. *Strauss*, 90 N. Y. 664; *Foot* v. *Beecher*, 78 id. 155; *Newton* v. *Harris*, 6 id. 345; *Starks* v. *People*, 5 Den. 108; Code Civ. Pro. § 995.) There is no exception to any specific proposition of the charge, or to any particular remark of the trial justice, in such manner as to show what was intended. (*McGinley* v. *U. S. Ins. Co.*, 77 N. Y. 495; *Jones* v. *Osgood*, 6 id. 235; *Lansing* v. *Wiswall*, 5 Den. 218, 219; *Arnold* v. *People*, 75 N. Y. 603; *Chipman* v. *Palmer*, 9 Hun, 518; *Groat* v. *Gile*, 51 N. Y. 431; *Oldfield* v. *N. Y. & H. R. R. Co.*, 14 id. 310, 313, 314, 315.)

EARL, J. This action was brought to recover the sum of $6,682, with interest thereon, which it is alleged Charles F. Hurlburt, the plaintiffs' intestate, placed in the hands of his

son Theron, defendant's intestate, as his agent, and for his benefit, in the latter part of the year 1881. Theron was a son of Charles, and he died December 25, 1883, and Charles died January 6, 1884.

The defendant claimed that the money was a gift to her husband, and that he was never under any obligation to repay the same. The plaintiffs were unable to produce any writing of any kind evidencing any obligation on the part of Theron to repay the money. They are the sons of Charles, and were the sole witnesses to establish their claim, and this they attempted to do by testifying to certain conversations which they overheard between their father and Theron.

Upon the trial the defendant rested her case mainly upon the conceded fact that for about two years before the death of her husband the money claimed had been in banks to his credit, and had been managed and controlled by him, and she produced proof of certain declarations and admissions made by Charles tending to show that the money was transferred by him to his son as a gift, and not to be held for his benefit.

During the progress of the trial the plaintiffs made objections to evidence, which were overruled, and they now claim some of the rulings were erroneous. We will briefly notice some of them.

Theron and Charles in the spring of 1883, went together to consult a lawyer by the name of Aldrich as to the best mode of disposing of or adjusting the prospective interest of the plaintiff Lyman, as an heir, in the farm belonging to his father, and several plans were suggested by Theron in the presence of his father, and assented to by him to accomplish that end. The statement was there made by Theron to the lawyer, and assented to by his father, that Lyman had had all his share in his father's personal property; and other statements were there made by Theron and assented to by his father, of similar import. Aldrich was called by the defendant to prove these statements and admissions. The plaintiffs objected to his evidence on the ground that he was an attorney consulted professionally, and that the communications to him were

privileged. The court overruled the objection and received the evidence.

We think that in receiving this evidence there was no violation of section 835 of the Code, which provides that "an attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." This section is a mere re-enactment of the common-law rule and it cannot be supposed from the general language used that it was intended to change or enlarge that rule as it had been expounded by the courts. It has frequently been said that the object of the rule embodied in the section is to enable and encourage persons needing professional advice to disclose freely the facts in reference to which they seek advice, without fear that such facts will be made public to their disgrace or detriment by their attorney. Such a case as this is plainly not within the rule. Here Theron and his father were both interested in the advice which they sought, and they were both present at the same time and engaged in the same conversation. Each heard what the other said, so that the disclosures made were not, as between them, confidential; and there can be no reason for treating such disclosures as privileged. It has frequently been held that the privilege secured by this rule of law does not apply to a case where two or more persons consult an attorney for their mutual benefit, that it cannot be invoked in any litigation which may thereafter arise between such persons, but can be in a litigation between them and strangers. (*Root* v. *Wright*, 21 Hun, 347; *Sherman* v. *Scott*, 27 id. 331; *Foster* v. *Wilkinson*, 37 id. 244; *Rosenburg* v. *Rosenburg*, 40 id. 91; *Whiting* v. *Barney*, 30 N. Y. 330; *Hebbard* v. *Haughian*, 70 id. 54; *Root* v. *Wright*, 84 id. 72.) Therefore, if Charles and Theron had been alive and parties to this action, this evidence would have been competent. And as it would then have been competent it is equally competent in this action between their personal representatives. The fact that these plaintiffs are personally interested in the estate of their father can make no difference in the application of the rule. They are parties to

this action only in a representative capacity. They legally stand as the representatives of their father and no one else. Evidence which would have been competent against him in his life-time is competent against his personal representatives. So we think that this case is not within the reason of section 835 and even if it should be regarded as within its letter, it should be taken out of the letter by the application of the familiar maxim "*Cessante ratione legis cessat ipsa lex.*"

Several witnesses were permitted to give evidence of declarations made by the plaintiffs' intestate tending to show that he had made a gift of this money to his son, and this evidence was objected to by the plaintiffs as incompetent. It is familiar law, for which no citation of authorities is needed, that the declarations of a testator or intestate binding him or binding or impairing his estate, may be given in evidence against his personal representatives in all cases where they would have been competent against himself if he had been living and a party to the action. His executor or administrator represents him and stands in his place, and his declarations admitting a debt or obligation, or tending to discharge a debt or obligation due him, or to impair his estate in any way, are competent in any litigation to which his personal representatives are a party. Therefore, the evidence of material admissions made by Charles in his life-time were competent against these plaintiffs.

It is further claimed that much of the evidence thus received was wholly immaterial, and should, therefore, have been excluded. We have carefully scrutinized the evidence, and while much of it has but a slight and remote bearing upon the case, yet we cannot say that any of it was wholly immaterial. It was competent for the defendant to prove the relations between Theron and his father, and to some extent, the dealings between them, and the relations between the father and the different members of his family.

Complaint is made of the charge of the judge. Our attention is called to no erroneous rule of law laid down by him, and the most that can be said is that the charge shows a significant leaning in favor of the defendant, and that the judge

was strongly impressed with the merits of the defendant's case. But the mere intimation of an opinion by the judge upon evidence, or upon the merits of the case, or his comments upon the evidence, though unfavorable to the party complaining, furnish no ground for a reversal here, so long as the whole case is submitted to the jury upon a charge which lays down no improper rule of law. If a judge in his charge to the jury uses such language as to improperly bias their judgments or influence their verdict, that may be ground for the court below, upon a motion for a new trial, to set aside the verdict, if satisfied that injustice has been done. But upon an appeal to this court where the court below has refused to set aside the verdict and has affirmed the judgment entered thereon, we can review only errors of law which have been properly excepted to.

A careful examination of the whole case leads us to the conclusion that the exceptions of the plaintiffs point out no legal error, and that there is no ground for a reversal of the judgment.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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WARREN BRYANT et al., as Executors and Trustees, etc., Appellants, *v.* HARRIET F. TRACY THOMPSON, Impleaded, etc., Respondent.

An appeal to this court does not lie for the purpose of settling abstract questions, however important, but is allowed only where the party appealing has an interest in the controversy which has been injuriously affected by the decision below.

A party seeking to have a judgment reviewed in this court must be able to point to some statute giving him the right and conferring jurisdiction.

The executors and trustees under the will of T. brought an action for its construction, asking the court to determine which of two parties was entitled to a certain fund in plaintiffs' hands as trustees. The judgment rendered decided the question, and this was acquiesced in by both of the alleged claimants to the fund, who were parties and were of age.

Statement of case.

Held, that as under the Code of Civil Procedure (§ 1294) the right to appeal is limited to "a party aggrieved," and as plaintiffs were not aggrieved by the judgment within the meaning of said Code, they were not entitled to appeal.

People ex rel. Burnham v. *Jones* (110 N. Y. 509), distinguished.

Reported below, 59 Hun, 545.

(Argued June 17, 1891; decided October 13, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 15, 1891, which affirmed a judgment entered upon the decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John G. Milburn for appellant. The plaintiffs have the right to bring this appeal. (*Bryant* v. *Thompson*, 36 N. Y. S. R. 921; *Bowers* v. *Smith*, 10 Paige, 193; *Wager* v. *Wager*, 89 id. 161; *Bailey* v. *Briggs*, 43 N. Y. 413; *Chipman* v. *Montgomery*, 63 id. 231; *Dill* v. *Wisner*, 88 id. 160.) The executors having an interest sufficient to entitle them to maintain an action of this character, have a sufficient interest to review any judgment rendered if they deem it necessary to insure the correct administration of their trust. (Code Civ. Pro. § 1294; *People* v. *Jones*, 110 N. Y. 509; *Bockes* v. *Hathorn*, 78 id. 222; 2 Perry on Trusts, § 928.)

John E. Parsons and *Charles Robinson Smith* for respondent. Only parties aggrieved can appeal. The word "aggrieved" in the statute refers to a substantial grievance, a denial to the party of some claim of right either of property or of person, or the imposition upon him of some burden or obligation. (Code Civ. Pro. § 446; *Banta* v. *Kent*, 4 Wkly. Dig. 62; *Reid* v. *Vanderheyden*, 5 Cow. 719; *Steele* v. *White*, 2 Paige, 478; *Colden* v. *Botts*, 12 Wend. 234; 2 Rumsey's Pr. 646; *Kelly* v. *Israel*, 11 Paige, 147, 152; *Card* v. *Bird*, 10 id. 426; *Hyatt* v. *Dusenbury*, 8 N. Y. S. R. 713; 106 N. Y. 663; *Ross* v. *Wigg*, 1 Cent. Rep. 292; *Bush* v. *R. C. Bank*, 48 N. Y. 659; *Kall* v. *Brooks*, 89 id. 33; *Hoag* v.

Hatch, 5 N. Y. Supp. 524; *Grow* v. *Garlock*, 29 Hun, 598; *People* v. *City of Troy*, 82 N. Y. 575.) The plaintiffs brought this action for a construction of certain clauses in the will which affect only the two defendants, and they asked the instructions of the court. They have obtained this relief, received their instructions; neither defendant complains. The plaintiffs are, therefore, not aggrieved. (*Hone* v. *Van Schaick*, 7 Paige, 222; *Cuyler* v. *Moreland*, 6 id. 273; *Idley* v. *Bowen*, 11 Wend. 227; *Card* v. *Bird*, 10 Paige, 426; *Reid* v. *Vanderheyden*, 5 Cow. 719; *Shipman* v. *Rollins*, 98 N. Y. 311.) This is like a bill of interpleader, the plaintiffs being stakeholders and the defendants being the two claimants. (*Dorn* v. *Fox*, 61 N. Y. 264; *Atkinson* v. *Manks*, 1 Cow. 691; *Cogswell* v. *Armstrong*, 77 Ill. 139; *Badeau* v. *Rogers*, 2 Paige, 209.) An executor cannot appeal in behalf of one set of legatees or creditors as against another, where all are before the court. (*Kellet* v. *Rathbun*, 4 Paige, 102; *Bates* v. *Ryberg*, 40 Cal. 463; *In re Wright*, 49 id. 550.) A trustee cannot appeal in behalf of one beneficiary as against others where all are before the court. (*Salmon* v. *Pierson*, 8 Md. 229; *Stewart* v. *Codd*, 58 id. 86.) The defendant Mrs. Roudebush has had her day in court, and the plaintiffs cannot appeal for her benefit. (*Reid* v. *Vanderheyden*, 5 Cow. 719; 1 Greenl. on Ev. § 522.) If the appellants have a right to appeal in part, they can call in question only that part of the judgment which affects them. (*Hone* v. *Van Schaick*, 7 Paige, 222; *Cuyler* v. *Moreland*, 6 id. 273; *Idley* v. *Bowen*, 11 Wend. 227; *Card* v. *Bird*, 10 Paige, 426.) A motion to dismiss is the proper proceeding when the appellant has not a legal right to appeal. (*People* v. *Lynch*, 54 N. Y. 681.)

O'BRIEN, J. The plaintiffs, as executors and trustees of the will of Francis W. Tracy, who died April 15, 1886, brought this action in order to procure a judicial construction of its provisions. The will and codicil dispose of a large estate, consisting of both real and personal property. Numerous large bequests were made to collateral relatives and also to various

public and private charitable institutions. The residuary estate was left to the widow. The only clause of the will with which we are concerned, in the decision of this appeal, is the one in which provision was made for the defendant Harriet F. Tracy, who is the only child and heir at law of the testator. At the time of his death she was an infant, nearly nineteen years of age, and since the commencement of this action and about the month of April, 1890, she married one George Thompson. She is the daughter of a former wife who obtained a divorce from the testator, many years before his death. When very young, she and her mother separated from the testator, took up their residence in the city of New York, while the deceased continued to reside in Buffalo, where he died. The relations between the deceased and his daughter, and her maternal relatives, had, for many years, been hostile. Her mother's maiden name was Robinson and the child took that name and is so designated in some parts of the case.

The testator, by a codicil to his will bearing date August 19, 1879, provided a trust fund of one hundred thousand dollars, the income of which was to be paid to the daughter during her life, the principal to be divided among her issue at her death. The form of the bequest was to the executors of his will, in trust. The same codicil contained, however, the following provision:

"In case any beneficiary named in my said last will and testament, whether a devisee, legatee, or *cestui que trust* therein named, shall, in person or by another, contest the probate of my said last will and testament or any codicil thereto, or shall institute any proceedings of any kind with a view to avoid or annul my said last will and testament or any codicil thereto, or any provision in my said last will and testament, or in any such codicil contained, then and in either case I do hereby revoke all provisions in my said last will and testament or in any codicil thereto contained in favor of the person or corporation contesting or seeking to avoid such last will and testament or codicil or provision. And if such contestant shall be my daughter, then I give, devise, and bequeath to my wife

all the property which in and by such last will and testament and the codicils thereto, is or shall be given to my executors in trust for my said daughter's benefit. If my wife shall be such contestant, then I give, devise, and bequeath to my executrix and executors all the property which is by my said last will and testament or any codicil thereto given to my wife, in trust for my daughter, upon the same trusts in every particular as are specified in the second article of this codicil."

It seems that the testator contracted a second marriage, and the wife referred to in the provisions of the will, and who took the residuary estate, and with whom he lived up to the time of his death, is the wife of this marriage. A few days after the death of the testator, his will, with the codicil, was presented to the surrogate of Erie county for probate by the plaintiffs, and a citation was issued and served upon the daughter, the defendant in this action. Upon the return day of the citation, the surrogate, of his own motion, appointed a special guardian for the daughter for the sole purpose of appearing and protecting her interests in the proceedings to prove the will. Subsequently, and after consultation with the defendant and her relatives in New York and with counsel there acting for them, the guardian interposed an answer before the surrogate, taking issue in the usual form with the allegations of the petition. The special guardian also retained counsel and, under the direction of the surrogate, the proponents of the will were required to produce many witnesses before him for examination, and the trial continued during a number of days. It was contended on behalf of the special guardian that the testator did not possess testamentary capacity, and various witnesses, including servants of the deceased and also experts, were called to sustain that contention. The guardian, through his counsel, requested the surrogate to refuse probate to the will. In the month of November, 1886, the surrogate entered a decree admitting the will to probate, which, among other things, contained this clause: "Pursuant to section 2623 of the Code of Civil Procedure, it is hereby stated that the probate of said will was contested." The daughter

herself was present at the hearing and was called and heard as a witness on behalf of the special guardian. After the entry of the decree admitting the will to probate, the widow executed, acknowledged and filed with the surrogate a paper, under seal, which recited that she was the residuary legatee and devisee of her late husband's will, which had been admitted to probate. The provision of the decree stating that it was contested, and of the will and codicil, that the legacy, in case of such contest, should be deemed revoked, were referred to. It then recited that she was desirous that all the provisions of her husband's will respecting his daughter should be observed, providing his reputation and capacity be not further questioned. It then stipulated that the executors (of whom she was one) shall not claim in any way that the right of the daughter to the provisions of the will for her benefit had been forfeited; that no effect should be given to the clause revoking the legacy, in case of a contest by the legatee, but that the legacy should be deemed legal and valid, and the trust in favor of the daughter executed. The consideration for this agreement on the part of the widow was stated to be the omission of the daughter to appeal from the decree of the surrogate, and it was in terms conditioned that no such appeal should be taken and that no action or proceeding of any nature should be brought by or in behalf of the daughter, or by any person claiming through or under her, to set aside the probate, or question the validity of the will, or the testamentary capacity of her husband, and in case such appeal, action or proceeding should be brought or instituted, then the stipulation and agreement should be void and of no effect. The special guardian, however, appealed from the decree of the surrogate to the General Term, where the decree was affirmed.

Two of the executors then brought this action to procure the judgment of the court as to the disposition of the one hundred thousand dollars which the daughter was to take by the provisions of the will. The widow, declining to become a party plaintiff, was made a defendant both individually and as executrix and trustee under the will. The daughter is the

only other defendant and no other question is raised by the pleadings. The complaint, after alleging the making of the will, its provisions, death of the testator and the proceedings before the surrogate, stated that the daughter still claimed the legacy, but that the plaintiffs were advised that, by reason of the clause above quoted and the contest, the provisions of the clause revoking the gift upon certain contingencies became operative and that the widow was entitled to the same. The relief asked was that the court give construction to the clauses of the will, touching the legacy and the fund mentioned therein, and that it determine the conflicting claims thereto and define the rights and duties of the plaintiffs, concerning the same. The Special Term held that the contest before the surrogate, by and in the name of the special guardian, was not a contest by the daughter in person or by another within the meaning of the clause in the codicil expressing the conditions upon which the legacy should vest and that she was entitled to the bequest. The General Term affirmed the judgment, but upon the ground that the daughter, being an infant and having merely submitted her rights to the court the revoking clause was, as to her, an attempt to subvert the course of judicial proceedings and to deprive the court of the right and duty imposed upon it by law in all cases to institute, of its own motion, proper proceedings for the protection of infants, and that as to the daughter the condition was void as against public policy. It held that the contest must be deemed to have been made by the daughter, although the actual steps were taken by the guardian. (*Bryant* v. *Thompson*, 59 Hun, 545.)

The widow allowed the judgment to pass without any answer or other opposition and the only parties who have appealed to this court are the two executors who brought the action. The argument of the case was accompanied by a motion in this court to dismiss the appeal. The question is, therefore, raised whether the plaintiffs have such a standing in the case as enables them to bring the appeal. The plaintiffs clearly had the right to bring this action in order to procure a judicial determination of the question as to which of two

claimants was entitled to the fund, and also to obtain the instructions of the court in regard to their duties under the will. They have obtained these instructions and this determination from the highest court of the state possessing original and general jurisdiction. There were two parties who had a pecuniary interest in the decision of the question involved in the case, the daughter, who is satisfied with the result, as it is in her favor, and the widow who does not appeal. The judgment rendered in the court to which the plaintiffs resorted in the first instance is a perfect protection to them in the disposition of the fund, in accordance therewith, and in the performance of every duty growing out of the legacy to the daughter under the provisions of the will. This being true, what interest have the plaintiffs in the further prosecution of the action. They had an interest and it was their duty to procure a judicial determination of the questions presented by the facts alleged, but no interest or duty in obtaining a decision according to some view of the law that they may have themselves entertained or have been advised by counsel. Appeals are not allowed to this court for the purpose of settling abstract questions, however interesting or important they may be to the general public or to the legal profession, but to correct errors injuriously affecting the rights of some party to the litigation. The plaintiffs are not concerned in the slightest degree in any legal sense with the question whether the provision for the daughter be held for her or deemed revoked under the other clause and secured to the widow. The widow is not here complaining of the result in the courts below. Had she waived in writing or in any other way binding upon her the conditions of her stipulation touching the contest before the surrogate after the General Term had passed upon the question, it would amount to a settlement of the controversy between the only parties having a pecuniary interest in it which would prevent an appeal. Looking at the substance of things and keeping in mind the relations which these two beneficiaries now hold to the case, we cannot see that the present appeal stands on grounds any different from what it would then.

Opinion of the Court, per O'BRIEN, J.

The widow, after the appeal to the General Term from the decree of the surrogate, could have waived the conditions contained in her stipulation in regard to the effect of an appeal, as she had before renounced the benefits of the clause revoking the legacy in case of a contest. She did not, it is true, waive these conditions expressly, but she failed, when made a party to this action, to insist upon them, and it is not perceived that the plaintiffs have any interest in insisting, through an appeal to this court, upon a point which the real and only beneficiary has refused to raise for herself. The widow, as already observed, conditionally renounced the benefits of the revoking clause by her deed, and no one, we think, should be permitted to urge that this deed has become inoperative by reason of a breach of its conditions except herself, and that position she is not, it seems, inclined to take. The plaintiffs are not seeking any benefit for themselves in the action; they have simply asked the judgment and advice of the court in regard to the disposition of property belonging to others, which is in their care and keeping. The court has given the judgment and advice prayed for and the real beneficiaries do not complain. Whether the plaintiffs are entitled to be heard further in this court does not depend upon any inherent right which the plaintiffs, as suitors have, but upon express statutory permission. (*State* v. *County of Kings*, 125 N. Y. 312.)

The right of a party to have all disputes in which he has any interest determined according to judicial forms, in a court possessing original jurisdiction, is absolute, if, indeed, there are any such rights, in a strict sense. But when he seeks to have the judgment reviewed in this court he must be able to point to some statute giving him the right and conferring the jurisdiction. The only statute relied upon as securing to the plaintiffs in this case the right to appeal is section 1294 of the Code of Civil Procedure, and under that section the right is limited to a party *aggrieved*. In this case the executors and trustees under a will, having asked the court for directions in regard to their duty, and for a judgment as to which of two parties is entitled to a certain bequest, which directions and

judgment are given and acquiesced in by both of the alleged claimants of the fund, the plaintiffs are not aggreived within the meaning of the statute by the judgment rendered. The question decided in the court below and presented by the record is, undoubtedly, one of great interest and importance, and for that reason should not be passed upon by this court until brought here by some party having an actual and practical, as distinguished from a mere theoretical interest in the controversy.

Cases can be and are cited by the learned counsel for the appellant, in which this court has entertained appeals by executors and trustees under wills from judgments of this character. But, it is believed that they are cases, either in which the point was not raised at all or, if raised, the appeal was not only by the trustees, as in this case, but by the beneficiaries also, so that a motion to dismiss, as now before us in this case, if granted, would not dispose of the case, but would still leave the same questions to be determined upon the appeal of the other parties. If, in this case, the widow had contested the right of the daughter to receive the legacy, and claimed it for herself under the clause providing for revocation, and had appealed to this court to maintain that position, and the appeal was before us, we would not then regard this motion as of much practical importance. This was the situation when the court was asked to dismiss the appeal in most, if not all the cases of a similar character to which our attention has been directed. An appeal to this court does not lie unless the party appealing has an interest in the controversy. (*People ex rel. Breslin* v. *Lawrence*, 107 N. Y. 607; *Hyatt* v. *Dusenbury*, 106 id. 663.)

The case of *People ex rel. Burnham* v. *Jones et al.* (110 N. Y. 509), is not contrary to these views. In that case the commissioners of the land office, representing the state, made a grant of land under water to an individual. Subsequently, the determination of the commissioners in making the grant, was reversed by the Supreme Court on certiorari, and the commissioners appealed to this court, where a motion to dismiss

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This action was brought to perpetually enjoin the defendants from operating their railway in Second avenue, between One Hundred and Twentieth and One Hundred and Twenty-first streets, in the city of New York, in front of the plaintiff's premises, and to procure the structure already built there to be removed, and to recover from defendants the loss and damage already sustained by reason of the past operating of the defendants' railway in front of the plaintiff's premises; and if the defendants should be permitted to so operate their road in the future, that it should be only upon condition that they first pay to the plaintiff the amount of the permanent loss and damage to her premises sustained by her by reason of such operation, and also the amount of her loss and damage already sustained. The defendants, in their answer to the complaint, set up various defenses, the chief of which and the one particularly argued and relied upon here is, that the railway was built in 1880, and has been in operation ever since, and if any damage has been inflicted upon plaintiff's premises by the erection and operation of the railway, such damage was inflicted at the time it was so built and operated, and at that time the premises were owned and possessed by some other person, and the plaintiff was not then their owner, and is not the owner of the cause of action.

The court found that the plaintiff, on the 23d of April, 1883, became the owner of the premises, and has ever since owned them, and since that time there has been a valuable building standing on them. Since that time the plaintiff has also owned, as attached or appurtenant to the premises, an easement of light, air and access in and over Second avenue, and the only property rights of the plaintiff interfered with by the defendants are easements of light, air and access therein, appurtenant to the plaintiff's premises, and she is not seized of any estate in the land forming the bed of such avenue in front of her premises. The railroad had, in fact, been built and in operation along Second avenue for some years prior to the time when the plaintiff purchased in 1883. She paid, according to some of the evidence, the fair market value of

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the lot with the railroad in the avenue. It was also proved that the plaintiff had sustained injuries by the construction and operation of the road from the time of her purchase to the trial of the action in the sum of $1,800, and that the value of the plaintiff's easement in the fee taken, appropriated or interfered with by reason of such construction and perpetual maintenance and operation of defendants' railway over and above any benefits resulting therefrom and peculiar to the premises, was the sum of $2,000.

It was also found that the defendants were authorized by certain acts of the legislature to exercise the right of eminent domain, and thus to acquire plaintiff's easement if necessary; and defendants had like authority to build the railway in the streets in which it has been built, but there was nothing in the acts giving the defendants any authority to take plaintiff's property without compensation. The road has been built under the provisions of the so-called Rapid Transit Act (Chap. 606 of the Laws of 1875).

Judgment was given for the plaintiff in accordance with the findings of the court, and it was provided that the injunction should not issue in case the defendants paid the amount of the damage to the fee upon the execution by plaintiff of a deed conveying to them plaintiff's interest in the easement taken by defendants.

The judgment so entered was affirmed by the General Term of the Superior Court of the city of New York upon appeal, and from the judgment of affirmance the defendants appeal here.

Julien T. Davies and *Brainard Tolles* for appellants. The plaintiff failed to show herself entitled to substantial damages or to an equitable remedy. (*Cooper* v. *Crabtree*, L. R. (19 Ch. Div.) 193. In this case the compensation withheld from plaintiff (the withholding of which constituted her real grievance), was pecuniary in its nature and susceptible of ascertainment. Plaintiff was, therefore, bound to show, as part of her cause of action, that it would be, or legally might be, assessed

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at a substantial sum. Equity does not intervene to prevent every trival, insignificant or unsubstantial violation of a bare legal right, but only where the injury apprehended is irreparable in its nature and substantial in amount, and where justice and good conscience are on the side of the applicant for its intervention. (*Hart* v. *McLaury*, 121 N. Y. 636, 643; *Genet* v. *D. & H. C. Co.*, 34 N. Y. S. R. 247, 253; *Jeffers* v. *Jeffers*, 107 N. Y. 653; *Corning* v. *T. I. & N. Co.*, 40 id. 220; *Clinton* v. *Meyers*, 46 id. 521; *People* v. *Canal Board*, 55 id. 397; *Health Dept.* v. *Purdon*, 99 id. 237; *Morgan* v. *Binghamton*, 102 id. 500, 504; *T., etc., R. Co.* v. *H. T., etc., R. Co.*, 86 id. 106, 123, 126; *People* v. *M. T. Co.*, 31 Hun, 596, 604; *Drake* v. *H. R. R. Co.*, 7 Barb. 508, 556, 559.) The plaintiff's right is really and substantially a right to compensation and not a right to the enjoyment of specific real property. (*Henderson* v. *N. Y. C. & H. R. R. R. Co.*, 78 N. Y. 423, 430; *Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 id. 98, 118; *Story* v. *N. Y. E. R. Co.*, 90 id. 122, 148, 171, 179; *Pond* v. *M. E. R. Co.*, 112 id. 189, 190; *Tallman* v. *M. E. R. Co.*, 121 id. 119, 125; *Abendroth* v. *M. R. Co.*, 122 N. Y. 1, 17; *N. Y. E. R. Co.* v. *F. N. Bank*, 135 U. S. 432, 440; *Krone* v. *K. C. E. R. Co.*, 50 Hun, 431, 432; *Taylor* v. *M. E. R. Co.*, 18 J. & S. 311, 322, 328; *Knox* v. *M. E. R. Co.*, 36 N. Y. S. R. 2; *S. A. R. Co.* v. *M. E. R. Co.*, 56 Hun, 182, 185; *P., etc., R. Co.* v. *Oliver*, 44 Am. & Eng. R. R. Cas. 175; *McElroy* v. *Kansas City*, 21 Fed. Rep. 257; *P., etc., R. Co.* v. *Kamlah*, 42 N. J. Eq. 93.) The easements in question have in themselves no more than a nominal value, and plaintiff's claim to substantial compensation rests wholly upon proof of consequential injury. (*Newman* v. *M. E. R. Co.*, 118 N. Y. 618; *Henderson* v. *N. Y. C. R. R. Co.*, 78 id. 423; *In re L., etc., R. Co.*, 27 Hun, 151; *In re N. Y., W. S. & B. R. Co.*, 29 id. 609; *In re B. E. R. Co.*, 28 N. Y. S. R. 627; *In re U. E. R. Co.*, 8 N. Y. Supp. 813; *In re K. C. E. R. Co.*, 35 N. Y. S. R. 367; *Bush* v. *M. E. R. Co.*, 26 Abb. [N. C.] 73; *Gray* v. *N. Y. E. R. Co.*, 12 N. Y. Supp. 542; *Welsh* v. *N. Y. E. R. Co.*, Id. 545; *Purdy* v. *M. R. Co.*, 36 N. Y. S.

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R. 43.) The measure of compensation, where part of an entire tract is taken, is the difference between the actual market value of the entire tract at the time of condemnation and the market value of what will be left after the part proposed to be appropriated is taken out. (*Newman* v. *M. E. R. Co.*, 118 N. Y. 618; *T. & B. R. R. Co.* v. *Lee*, 13 Barb. 169; *In re N. Y., L. & W. R. Co.*, 27 Hun, 151; *In re N. Y., W. S. & B. R. Co.*, 29 id. 609; *In re U., C. & S. V. R. R. Co.*, 56 Barb. 456; *In re N. Y. C. & H. R. R. R. Co.* v. *Judge*, 15 Hun, 63; *In re Furman Street*, 17 Wend. 649; *Muller* v. *S. P. R. R. Co.*, 83 Cal. 240; *Geissinger* v. *Borough of Hellertown*, 19 Atl. Rep. 412; *C. L. Co.* v. *City of Providence*, 15 R. I. 246; *F. W. & N. O. R. Co.* v. *Pearce*, 75 Tex. 281; *O. B. R. Co.* v. *McDermott*, 25 Neb. 714; *P. S. V. R. Co.* v. *McCleary*, 125 Penn. St. 442, 451; *W. & W. R. Co.* v. *Kuhn*, 38 Kan. 104; *C., C. C. & N. Y. S. R. R. Co.* v. *Aunsman*, 11 Atl. Rep. 561; *R., etc., R. Co.* v. *Balthasar*, 119 Penn. St. 483; *Kucheman* v. *C. C. & D. R. Co.*, 46 Iowa, 366, 376; *J., etc., R. Co.* v. *Esterle*, 13 Bush. 667; *B. & P. R. Co.* v. *McComb*, 60 Me. 290; *I., B. & W. R. Co.* v. *Allen*, 100 Ind. 409; *V. & T. R. Co.* v. *Henry*, 8 Nev. 165; *Dearborn* v. *B., C. & M. R. Co.*, 24 N. H. 179; *In re M. W. R. Co.*, 35 id. 134; *Page* v. *C., M. & St. P. R. Co.*, 70 Ill. 324, 328; Cooley on Const. Lim. 565; Lewis on Em. Domain, § 478; *S. A. R. Co.* v. *M. E. R. Co.*, 56 Hun, 122; *P., etc., R. Co.* v. *Vance*, 115 Penn. St. 325; *Lawrence* v. *Boston*, 119 Mass. 126; *DeBoul* v. *F. & M. R. Co.*, 111 Ill. 499; *Brown* v. *C. R. R. Co.*, 125 id. 600; *Esch* v. *C., M. & St. P. R. Co.*, 72 Wis. 229; *S., etc., R. Co.* v. *Keith*, 53 Ga. 178; *Molton* v. *N. W. Co.*, 137 Mass. 163; *U. D. T. Co.* v. *Brunswick*, 31 Minn. 297; *V. & T. R. Co.* v. *Elliott*, 5 Nev. 358; *In re B., H. T. & W. R. Co.*, 22 Hun, 176; *Montgomery Co.* v. *S. B. Co.*, 110 Penn. St. 54; *Harrison* v. *I. M. R. Co.*, 36 Ia. 323; *Boom Co.* v. *Patterson*, 98 U. S. 403; *C. B. R. Co.* v. *Andrews*, 26 Kan. 702; 2 Washb. on Real Prop. § 284; Washb. on Easements, chap. 5, § 7; *Cartwright* v. *Maplesden*, 52 N. Y. 652; *S. V. O. A.* v. *City of Troy*, 76

id. 113; *Dyer* v. *Sanford*, 7 Metc. 395; *Winter* v. *Brockwell*, 8 East, 308; *Morse* v. *Copeland*, 2 Gray, 302; *Hoch* v. *M. E. R. Co.*, 37 N. Y. S. R. 200; *Herzog* v. *M. R. Co.*, Id. 56.) A jury might well find that the loss sustained by one who exercised his lawful right of selling his own property, and was compelled by such a state of the market to accept a diminished price for it, was the natural and proximate result of the construction and maintenance of the railroad. And if they so found, there is no legal reason why the railway company should not be liable to make compensation for the loss actually sustained. (*Squire* v. *Gould*, 14 Wend. 159; *Wynehamer* v. *People*, 13 N. Y. 378.) The wrong to be redressed in such a case is one which is personal to the owner, and which results from discrediting the property in the market and which accrues only when the property is brought into the market for sale. It bears more analogy to slander of title than to any other tort mentioned in the books. (*Like* v. *McKinstry*, 41 Barb. 186; *Dodge* v. *Colby*, 108 N. Y. 445; *Hargrave* v. *McKinstry*, 41 Barb. 186; *Law* v. *Harwood*, Cro. Car. 140; *Gresham* v. *Grinsley*, Yelv. 88; *Wilson* v. *Dubois*, 35 Minn. 471; *Swan* v. *Tappan*, 5 Cush. 104; *Stark* v. *Chetwood*, 5 Kan. 151; *Northrup* v. *Hill*, 57 N. Y. 351, 358; *Backhouse* v. *Bononi*, 9 H. L. Cas. 503, 513.) One who owned lands at the time of the construction of the railroad and who still retains the title, cannot recover permanent damages in an action at law, but is limited to such temporary damages, if any, as he has sustained up to the time of commencement of his action. (*Uline* v. *N. Y. C. R. R. Co.*, 101 N. Y. 98; *Mahon* v. *N. Y. C. R. R. Co.*, 24 id. 658; *Pond* v. *M. E. R. Co.*, 112 id. 186; *Otenot* v. *N. Y., L. & W. R. Co.*, 119 id. 603; *Tallman* v. *M. E. R. Co.*, 121 id. 119.) By an equitable action he may, however, compel the assessment and payment of that just compensation to which he is entitled under the Constitution. (*N. Y. N. E. Bank* v. *M. E. R. Co.*, 108 N. Y. 660; 112 id. 190; *Tallman* v. *M. E. R. Co.*, 121 id. 119; *N. Y. E. R. Co.* v. *F. N. Bank*, 135 U. S. 432.) Complete redress is given by including in the award a fair compensation

for the injury done to the marketable character of the property by the already existing structure. (*Henderson* v. *N. Y. C. R. R. Co.*, 78 N. Y. 423, 433.) One who has sold property injured by the construction of the railroad may recover in an action at law the loss actually sustained by him in the sale. (*Henderson* v. *N. Y. C. R. R. Co.*, 78 N. Y. 423; *Porter* v. *M. E. R. Co.*, 120 id. 284; *King* v. *Mayor, etc.*, 102 id. 171; *McFadden* v. *Johnson*, 72 Penn. St. 335; *Foote* v. *M. E. R. Co.*, 36 N. Y. S. R. 119; *Peck* v. *Goodberlett*, 109 N. Y. 180; 112 id. 189; *Mortimer* v. *M. R. Co.*, 25 J. & S. 509; *Taylor* v. *M. E. R. Co.*, 18 id. 311; *Lawrence* v. *M. E. R. Co.*, 126 N. Y. 483; *Dunlap* v. *T., etc., R. R. Co.*, 50 Mich. 470; *Pomeroy* v. *C., etc., R. Co.*, 25 Wis. 643; *Church* v. *G. R., etc., R. Co.*, 70 Ind. 163.)

Charles Gibson Bennett for respondent. The fact that the plaintiff acquired title to her premises after the construction of the railway is no bar to the relief awarded her by the judgment. (4 Kent's Comm. [10th ed.] 425; 101 N. Y. 98; 112 id. 186; *Corning* v. *T. I. & N. Foundry*, 40 id. 191; *Broiestedt* v. *S. S. R. R. Co.*, 55 id. 220; *Westbourne* v. *Mordant*, 1 Croke, 191; *Beswick* v. *Canden*, Id. 462; *Blunt* v. *Aiken*, 15 Wend. 522; *Brady* v. *Weeks*, 3 Barb. 157; *Campbell* v. *Seaman*, 63 N. Y. 568; *Staple* v. *Spring*, 10 Mass. 74; *Mahon* v. *N. Y. C. R. R. Co.*, 24 N. Y. 658; *Pond* v. *M. E. R. Co.*, 112 id. 186; *Bowie* v. *Brahe*, 3 Duer, 35; *Livingston* v. *P. I. Co.*, 9 Wend. 511; *Griswold* v. *M. E. R. Co.*, 122 N. Y. 102; 119 id. 540; 19 J. & S. 1; *Mitchell* v. *M. E. R. Co.*, 9 N. Y. Supp. 829; 12 id. 516.)

PECKHAM, J. The structure erected by defendants in Second avenue, in front of the plaintiff's premises, was as to her an illegal structure and inconsistent with the use of the avenue as a public street. At the time of building the railway a trespass was committed by the defendants upon the property now owned by the plaintiff, although she did not own it at that time. Such trespass has been continued from the time when the road was

built up to the time when the judgment in this action was entered. By continuing the trespass the defendants laid themselves open to continuous actions, in which the recovery would be for the damage sustained up to the time of the commencement of each action. These propositions are clear, and are now undisputed. They have been settled by the *Story* and the *Uline* cases, so familiar to the court and the bar (90 N. Y. 122; 101 id. 98). The structure being illegal as to plaintiff, and constituting a continuing trespass, the railroad company is under a legal obligation to remove it and the law presumes that the company will do so.

In an action at law the owner of the property interfered with or trespassed upon cannot recover damages to his premises, based upon the assumption that such trespass is to be permanent. He can recover only the damages which he has sustained up to the commencement of the action. The judgment entered for the damages sustained does not operate as a purchase of the right to continue the trespass. But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that, upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant *shall* pay such sum and that the plaintiff shall so convey. It provides that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuse to pay, the injunction issues. It may be that, in the case of a railroad actually running its cars upon or through property of another, it would not be justified in refusing to pay upon the delivery of the conveyance, and, instead thereof, submitting to an injuction. Public interests might have a right to be heard in that respect. But it is enough to say that, in the cases where permanent damage is to be paid, there is a condi-

tion that a conveyance shall be made, and the defendant thus secures title to the property used. In cases where the owner wishes to actually stop the further trespass and where the defendant has no legal right to acquire the property, such condition would not be inserted, and an injunction would issue upon the right of the owner being determined. (*Henderson* v. *Central Railroad Co.*, 78 N. Y. 423.)

The plaintiff, if he receive the amount of the permanent damage, is by the court compelled to convey the interest to the defendant which the defendant pays for in that way. Condemnation proceedings are thus avoided. It is conclusively determined that the trespass is to be continuous, and defendant concedes it when it avails itself of the condition and pays the permanent damage in order to receive the conveyance. It is only in this way that the owner recovers as for a permanent damage to his property.

In a case where the defendant has no power to condemn the property, if the owner in that event proceed in equity, he recovers only his damage up to the entry of the judgment, and at the same time secures an injunction which prevents the future trespass. If the owner sue at law he recovers his damages as stated. If the owner, without having brought any suit in equity, sell his property at a loss caused by the erection of the railroad, the question at once arises as to what rights are acquired by the purchaser, and what claim, if any, has the vendor against defendant. The vendee has in such case purchased and the vendor has sold to him in fee simple absolute the premises fronting the street, to which premises are attached, as property passing to him by the conveyance, the easements of light, air and access which the defendants have already interfered with and trespassed upon by the erection and operation of the road. (*Story* v. *El. R. R. Co.*, 90 N. Y. 122; *Lahr Case*, 104 id. 268; *Kane Case*, 125 id. 164.) The vendee finds the railroad making use of a portion of his property without right, and in the character of a mere wrong-doer. That use depreciates the value of the remaining part of the owner's property and causes him daily damage. He institutes his action, either at law or in

equity, to recover damages up to the time of the commencement of the action or permanently, and for an injunction, as the case may be, and in answer to proof of ownership and daily or permanent damage, he is told by way of defense that the railroad company paid or is liable to pay to his vendor the difference between what the vendor sold the property for to him and what it could have been sold for if the railroad were not there, and, therefore, it has the right to continue the act which, by such payment or liability, has been changed from a trespass to a valid action. It is true that the railroad has not received any conveyance of any right to continue the trespass. On the contrary, the vendor conveyed to plaintiff the absolute fee simple in the property, and all the ordinary rights of ownership passed with such conveyance. It was after such conveyance, and when the vendor was no longer owner, that, according to defendants, the company paid, or became liable to pay, his alleged loss caused by such sale, and which payment or liability defendant now claims has altered the situation so effectually. The vendee who obtained the property at what may have been a low price has, nevertheless, the rights of a general owner, which are not dependent upon the price which he paid for his title. Every day that the company operates its road over or through the property of the plaintiff it commits an illegal act or trespass, and the character of that act with respect to the property of the plaintiff is not in any degree affected by the fact that the plaintiff's vendor sold his property at a loss, which that vendor says he sustained from the illegal action of the defendant. There is no doubt that the same easements which were appurtenant to the premises owned by the plaintiff's vendor passed to his vendee, the present plaintiff, by the conveyance to her. They passed because they were appurtenant, and the vendor never attempted to reserve them, assuming even that such reservation were a legal possibility. As these easements passed to the vendee and became her property, as much so as the land itself, how is it that the railroad company has become possessed of the right to appropriate such easements, or any portion of them, without

payment to her? Her private property is taken without compensation to her under such circumstances, if defendant have the right to permanently enter upon and use these easements, and thus a constitutional guaranty is violated in her case and she is without redress. The answer to this assertion is made by the counsel for defendants in a very ingenious argument, the foundation of which is, however, laid in what seems to me an erroneous application of a general rule relating to the measure of damages in condemnation proceedings, and from which it is argued that the real actionable loss falls upon the owner of the property when the road was built, provided he sells his property in a depreciated market. They claim that such an owner has a cause of action to recover the loss he has sustained by a sale of his property in a market depreciated by the wrongful act of defendants in entering upon or appropriating the easements appurtenant to such property.

The argument, of course, assumes that if such a cause of action be made out, it must follow that none arises in favor of a subsequent purchaser who obtains the land at a price reduced on account of the existence of the road. Unless the one cause of action exclude the other the defendants would accomplish nothing by proving the existence of one in favor of the original owner.

The defendants' counsel assert that the permanent damage to the property was sustained by the vendor at the time he sold to the plaintiff, and that the company is liable to pay the same to him. Hence they say that in taking from the present owner the easements spoken of, which, when separated from the land to which they are appurtenant, are of themselves but of nominal value, the defendants would only be condemned to pay therefor a nominal sum, such as six cents; and as to the resulting loss in value to the adjoining land of the vendee, caused by the erection and operation of the railroad, the vendee has not sustained that loss, because she has only paid for the property the sum to which it had depreciated by reason of the existence of the road in front of it. Continuing the argument the counsel for the defendants state that if the present owner

(the vendee) should commence an action to restrain the further trespass, the defendants could at once commence proceedings to condemn the easements, and that the rule of damages would be the difference between the present market value of the whole property and that portion which would be left after the taking, and that difference would be nominal only. So that when the present owner commences her action to restrain the further commission of the trespass, the whole matter may be adjusted in such suit, and the same rule of damages would obtain. The result would be either that the defendants would be enjoined from further operating their road until they paid six cents, the nominal damage sustained by the present owner of the easements, or else the bill would be dismissed entirely on the ground that the aid of equity could not be invoked for the purpose of compelling the payment of merely nominal damages. This course of argument does not, as it seems to me, answer the claim of the present owner to enjoin the further trespass upon her property unless she is paid the damage which such trespass will permanently cause her. That damage is not merely nominal.

In 1880, the defendants erected their road, and by its erection and operation depreciated the value of the property now owned by the plaintiff. In erecting their road they trespassed upon the easements appurtenant to that property, and such trespass has been continuous ever since. By these wrongful acts the market value of the plaintiff's property has been greatly depreciated. If they were compelled to resort to condemnation proceedings, the defendants say it is the present market value which they must pay. The vice in this argument lies in the erroneous statement of the measure of damages. In such case and under these circumstances, where the value has been depreciated by the wrongful entry of defendants upon the property, it is not the present market value of such property thus damaged that the defendants must pay. Actual market value at the time of the institution of the condemnation proceedings is usually the inquiry. But when the defendant has already entered upon the property and has depreciated its

value thereby, it is plain that the simple question of value at the time of condemnation is not the proper rule. In such case the inquiry must be what would be the fair market value of the whole property at the time of condemnation, *without the railroad*, and the difference between that sum and the present market value of the property left, with the railroad in existence, would constitute the measure of damages to which the owner would be entitled. This inaugurates no new rule of damages in condemnation proceedings in this state. As the entry was unlawful, it is for the purpose of arriving at the value of the property regarded as not made, and the inquiry is what is the present value of such property without the presence of a structure which is there without right and which cannot be continued without payment in full for all damage done. Its existence cannot be considered for the purpose of diminishing what would otherwise be the present market value of the property. I think the same rule would hold in the case put by the defendants, where the city or any other body having the power should seek to take the owner's property, even though such owner had himself purchased subsequent to the erection of the road. The city would have no right to take the property from its owner on a valuation based upon the permanent character of a trespass which the law regards as temporary. The inquiry in the case supposed would still be, what would be the fair market value of the property with the railroad away? That sum the city would have to pay, and when it acquired the title it would have the same right as any other owner to compel the defendants to desist from their trespass or pay the amount of permanent damage they caused by its continuance. Under this rule the amount which the present owner may have paid for the property will be wholly immaterial. As the act of the defendant in trespassing upon or appropriating any portion of the property was unlawful, any depreciation in the value of the property caused by such illegal action cannot be regarded in fixing the value of the property to be taken or the damage to that which will remain. The claim of the defendants that the loss from the depreciation in value was suffered by the original

owner when he sold, and that it is a personal claim in his case against them for which they are responsible, cannot, as it seems to me, be maintained. Such a doctrine would do away with the right of an owner of property to prevent a continuous trespass upon it by another. The defendants would say that, because the original owner transferred the property to his vendee, the defendants, by reason thereof, were thereby invested with the right to continue forever the original trespass, and the consideration for such license rested in their liability to pay (not necessarily in the payment to) the vendor the difference between the sum which he actually received for the conveyance of his land and that which he would have been able to secure had it not been for the acts of the defendants. Whether such sum had been paid or not would be immaterial so far as concerned the present owner. That would be a matter between the original owner and the defendants. But the present owner, on account of the transfer of the land to him, would really have no right to prevent the trespass, no matter how much in truth his property was damaged, and although the defendants had no more title to the property trespassed upon than they ever had. They could have no title because the original owner transferred it to his vendee, and after such transfer, of course, that owner could not again transfer any portion of the property to anyone else. The vendee took the title, and he certainly has not conveyed it to the defendants, but, on the contrary, still retains it absolutely. Thus with no title the defendants have by this course of reasoning been, in substance, invested with a right to perpetually appropriate property belonging to the plaintiff, because of a liability on their part, as they allege, to pay a former owner certain damages which he alleges he sustained by selling his property to the plaintiff at a reduced value caused by defendants' illegal act. This mere liability of the defendants to reimburse the vendor operates, by defendants' argument, as a bar to the rights of the vendee. If not paid by the defendants the liability still remains, and, of course, the bar still continues; and thus the general right which follows the possession of property to protect it

from a trespass is denied an owner, because the defendants are, they say, liable to a former owner on a personal claim by him for a loss occasioned by a sale. Heretofore absolute ownership or legal possession of property has been regarded as sufficient to enable the owner to protect it from a trespass. It has been sufficient to permit him to maintain an action to restrain its continuance, even though he was fortunate enough to secure the property at one-half its value. The inquiry in such cases, where the owner sought to restrain the future trespass, has never been in regard to the price which the owner paid, or whether the former owner sold at a loss on account of the trespass. The inquiry has been whether the plaintiff was the owner or entitled to the possession, and whether the acts of the defendants were illegal. That is all that should now be required..

I have thus far referred to the case of the vendee for the purpose of inquiring what rights appertained to him as the present owner of the property. But the argument in favor of the vendor, who owned the property when the road was built, and who sold his land in a depreciated market caused by the wrongful acts of the defendants, is not to my mind very strong.

In the first place, he had his right of action to recover for all damage caused by the trespass up to the time of the commencement of his action, and the subsequent conveyance of the land would not in any way affect that right. If he desired to restrain the further continuance of the trespass or to recover for the permanent damage caused, he could, while owner, commence and maintain his action in equity. In that action he would obtain full relief. If he chose to sell instead of using the remedies which the law gives him, that was a matter, legally speaking, of his own choice. The defendants did not compel, or limit, or restrain such sale. Nothing that they did could be said to amount to any compulsion by them. The law says their action cannot be regarded as a permanent trespass for the very reason that it is unlawful, and the law will not presume that an unlawful act is to be forever continued. His choice to sell,

rather than avail himself of the remedies given him by the law, does not furnish a cause of action against the defendants to reimburse him for a loss arising because of the presumption he has indulged in that the trespass would be continuous and unpaid for. He has chosen to regard the trespass in a light opposite to that in which the law regards it, and the loss he has suffered thereby is not one which the law can regard as caused by the defendants. If the original owner thus choose to sell his property without enforcing those rights which he has only by virtue of such ownership, the purchaser at any rate takes his fee and with it the rights of such an owner. The right to enjoin the continuance of the trespass has not escaped by the conveyance. It cannot rest with the vendor, for he has no longer any interest in the land. Unless it passed to the vendee it has vanished, and yet no conveyance by any one having the right to convey has been made to the trespasser, and so far as the legal title to the property is concerned, the trespasser has no lot or parcel in it. It seems to me the right passed to the vendee.

I can see no similarity in the case of the owner of property who has thus sold at a loss, to that of one who has suffered from a slander of his title. To start with, there is in the case at bar no slander. And, again, there is no malice. The erection of a structure on plaintiff's property by defendants cannot be twisted into a slander of plaintiff's title by them. No one asserts that the defendants built their road knowing they were wrong-doers or trespassers. The findings in this case substantially negative any such idea. The court finds that the road was built in conformity with plans prescribed by boards of commissioners appointed under legislative authority. It has been held that punitive damages ought not to be awarded against defendants for the taking of the property of abutting owners by the building of their road. (*Ponners* v. *Manhattan R. Co.*, 120 N. Y. 178.) In brief, all the substantial facts which constitute a cause of action for slander of title are absent in this case, and the facts which exist have no analogy to those which constitute such a cause of action. The wrong by

the defendants in the erection of the railroad does not directly or proximately cause the sale of the vendor's property at a loss. The defendants' counsel lays down the rule broadly that "whoever, by a wrongful act, limits or restrains another in respect to his lawful right to dispose of his property in the market to the best advantage, is liable in an action at law for the damages thereby occasioned." Without stopping to question the accuracy of the rule, which the defendants here lay down as an abstract proposition, I think no case can be found where it has been enforced under such circumstances as this case presents. All the facts must be here taken into account. It must be remembered that the law regards the act as a temporary wrong only, and as such it provides a full remedy for it. It provides a full equitable remedy, if the owner choose to pursue it and the act be of a permanent nature.

If, instead of resorting to his legal or his equitable remedy, he choose to sell, it cannot be said that, in a legal sense, he has been limited or restrained in respect to his lawful right to sell his property by defendant's wrongful act. The connection between the sale and the alleged cause is too remote and indefinite; it is not proximate or direct. Further than this, however, the right of action with respect to the damage inheres in the owner and possessor of the land, and it is by reason of such ownership and possession that the right of action accrues. (*Broiestedt Case*, 55 N. Y. 220; *Corning* v. *Troy, etc., Factory*, 40 id. 191.) A perpetual injunction was sustained in the first above-entitled case, which was obtained by a purchaser of land abutting on the street, restraining the further operation of the road, although it was operated prior to his purchase. Nothing that has been said in any other case in this court is opposed to these views. On the contrary, they are in the line of all its previous utterances. The point was not decided in the *Henderson* case, nor has it been decided in the *Lawrence* case against these same defendants (reported in 126 N. Y. 483). The question in the last case was in relation to the validity of the defense alleging that the property was used for the purposes of a house of prostitution. The defense was disallowed

for the reasons stated in the opinion of ANDREWS, J., and the rule of damages stated in the *Uline* case was reiterated, that of diminished rental value. The case of *King* v. *Mayor, etc.* (102 N. Y. 171), simply held that the right to compensation for the property taken belonged to him who was the owner of the fee at the time the city took possession, although before the award under the statute the original owner had conveyed the premises. This was upon the ground that the statute authorizing the taking contained an adequate and certain method for raising the money on the part of the city to pay for the taking, and that when the possession was taken by the city under the statute it was a legal possession, and the award which was subsequently made paid for the title at the time the possession was taken, and that was in the original owner who conveyed before the award was made. The *Tallman* case (121 N. Y. 119), does not assert or assume that the plaintiff could recover for the diminished rental value for a term any portion of which was in the future. The recovery in that case had been allowed for a possible use of the premises which the plaintiff had not, in fact, attempted to make, and the possible profits for such possible use we held he was not entitled to recover. I have, as is seen, alluded to but a few of the many cases cited by counsel in the very elaborate briefs submitted to us. I have, however, read them, and I feel confident that nothing is laid down herein which is opposed to anything heretofore decided by this court. What the ultimate rights of lessor and lessee, as against defendants, may be we, of course, do not decide in this case. Their rights are not before us. Whether there is or is not any distinction between the rights of a vendor in fee, and those of a lessor is not the question and we do not, therefore, discuss it. The judgment here should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

EDWARD ROBERTS, Respondent, *v.* THE NEW YORK ELEVATED RAILROAD COMPANY et al., Appellants.

Where, in an action by an abutting owner to restrain the operation and maintenance of an elevated railroad in a street, the question as to the fee value of the property rights of which plaintiff is deprived by the unlawful structure is gone into for the purpose of determining the amount to be paid by defendant for a conveyance of those rights, the defendant is entitled to claim that the investigation shall be made upon competent and legal evidence, and if improper evidence is admitted, to its damage, it has the right to ask the appellate court for relief; it is no answer that defendant is not bound to avail itself of the privilege granted of paying the amount of damages found for a conveyance of the easements, but may submit to an injunction.

As to whether the defendant has the right to refuse to pay and to submit to the injunction, *quære*.

In such an action the opinion of an expert as to what would have been the value of plaintiff's property had defendants' road not been built and operated is incompetent testimony. (RUGER, Ch. J., and GRAY, J., dissenting.)

Clark v. *Baird* (9 N. Y. 183); *Kenkele* v. *Manhattan R. Co.* (55 Hun, 398); *McGean* v. *Manhattan R. Co.* (117 N. Y. 219), distinguished.

R. & S. R. R. Co. v. *Budlong* (10 How. Pr. 289); *Hine* v. *N. Y. E. R. R. Co.* (36 Hun, 293), disapproved.

(Argued April 14, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 5, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action to restrain defendants from maintaining and operating their elevated railroad on Third avenue in front of plaintiff's premises in the city of New York, and to recover damages. The judgment granted the injunction asked, unless defendants pay a sum stated as the value, and upon conveyance of the plaintiff's easements in the street taken by the road, in which case the injunction was denied.

The facts, so far as material, are stated in the opinion.

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Brainard Tolles for appellant. The learned trial judge erred in receiving the opinions of witnesses as proof of the existence and amount of damages to plaintiff's property. (*McGean* v. *M. R. Co.*, 117 N. Y. 219; *Avery* v. *N. Y. C. & H. R. R. R. Co.*, 121 id. 31; *Morehouse* v. *Matthews*, 2 id. 514; *Clark* v. *Baird*, 9 id. 183; *Van Deusen* v. *Young*, 29 id. 9; *Marcly* v. *Shults*, Id. 346; *Teerpenning* v. *C. E. Ins. Co.*, 43 id. 279; *Green* v. *Plank*, 48 id. 669; *Van Zandt* v. *M. B. Ins. Co.*, 55 id. 169; *Ferguson* v. *Hubbell*, 97 id. 507; *Wakeman* v. *W. & W. M. Co.*, 101 id. 205; *Reed* v. *McConnell*, 101 id. 270.) Such evidence encroaches upon the functions of the jury or other appointed triers of fact. (*Van Deusen* v. *Young*, 29 N. Y. 9; *Van Zandt* v. *M. B. L. Ins. Co.*, 55 id. 169; *Avery* v. *N. Y. C. & H. R. R. R. Co.*, 121 id. 31; *Fish* v. *Dodge*, 4 Den. 311; *Cook* v. *Brockway*, 21 Barb. 331; *Simons* v. *Monier*, 29 id. 419; *Lincoln* v. *S., etc., R. Co.*, 23 Wend. 425; *Fleming* v. *D. & H. C. Co.*, 8 Hun, 358; *Hudson* v. *Caryl*, 2 T. & C. 245; *Rauch* v. *N. Y., L. & W. R. Co.*, 2 N. Y. Supp. 108; *W., etc., R. Co.* v. *Kuhn*, 38 Kan. 675; *Prosser* v. *W. Co.*, 18 Ia. 327; *Railway Co.* v. *Gardner*, 45 Ohio St. 309; *C., etc., R. Co.* v. *S., etc., R. Co.*, 67 Ill. 142; *Hames* v. *Brownlee*, 73 Ala. 277.) It violates the rule that opinion evidence shall be received only in cases of necessity. (*M., etc., R. Co.* v. *Kellogg*, 94 U. S. 469; *Carter* v. *Boehm*, 3 Burr, 1913, 1914; *Teerpenning* v. *C. E. Ins. Co.*, 43 N. Y. 279; *Reed* v. *McConnell*, 101 id. 270; *Van Wycklen* v. *City of Brooklyn*, 118 id. 424; *Dolittle* v. *Eddy*, 7 Barb. 74; *Drucker* v. *M. R. Co.*, 106 N. Y. 157; *McGean* v. *M. R. Co.*, 117 id. 219.) It involves a conclusion of the witness upon a matter of law as to the measure of damages. (*Richardson* v. *Northrup*, 66 Barb. 85; *Matter of N. Y., W. S. & B. R. Co.*, 29 Hun, 609; *White* v. *Stoner*, 18 Mo. App. 540; *Rochester, etc., R. Co.* v. *Budlong*, 10 How. Pr. 289; *Decker* v. *Myers*, 31 id. 372.) The formation of such conclusions does not appertain to any science, art, trade or occupation known to mankind. (*Ferguson* v. *Hubbell*, 97 N. Y. 507; *Van Wycklen* v. *City of Brooklyn*, 118 id. 424; *Duff*

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v. *Lyon*, 1 E. D. Smith, 536; *Thompson* v. *P. R. Co.*, 51 N. J. L. 42.) The matter is one upon which judges and jurors are as competent to pass as any witness, when the necessary facts as to values and courses of values are placed before them. (*Ferguson* v. *Hubbell*, 97 N. Y. 507; *Reed* v. *McConnell*, 101 id. 270; *Thompson* v. *P. R. Co.*, 51 N. J. L. 42.) Such conclusions are conjectural and can have no certain or definite basis of fact. (*Marcly* v. *Shults*, 29 N. Y. 346; *Wakeman* v. *W., etc., Co.*, 101 id. 205; *Lamoure* v. *Caryl*, 4 Den. 370; *Lincoln* v. *S., etc., R. Co.*, 23 Wend. 425; *Thompson* v. *M. R. Co.*, 29 N. Y. S. R. 720; *M., etc., R. Co.* v. *Kellogg*, 94 U. S. 474.) The admission of such evidence tends to induce an omission to prove the facts necessary for an independent and intelligent decision of the question of damage. (*Morehouse* v. *Matthews*, 2 N. Y. 514; *Avery* v. *N. Y. C. & H. R. R. Co.*, 121 id. 31; *Paige* v. *Hazard*, 5 Hill, 603; *Giles* v. *O'Toole*, 4 Barb. 261; *Newton* v. *Fordham*, 7 Hun, 58.) Such evidence cannot be tested or contradicted by proof of facts. (*Cook* v. *Brockway*, 21 Barb. 331; *Ferguson* v. *Hubbell*, 97 N. Y. 507, 514; *Booth* v. *C. M. Co.*, 74 id. 15; *Folkes* v. *Chadd*, 3 Doug. 157; Stephen on Evidence, art. 50.) Such evidence affords an ample field for bias and corruption, and is contrary to the policy of the law. (*Tracy Peerage Case*, 10 Cl. & Fin. 154, 191; *Ferguson* v. *Hubbell*, 97 N. Y. 507; *Wakeman* v. *W., etc., Co.*, 101 id. 205; *Reed* v. *McConnell*, Id. 270; *People* v. *Kemmler*, 119 id. 580; *E. R. Co.* v. *Fitzpatrick*, 10 Ind. 120; *Martin* v. *N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 626; *Duff* v. *Lyon*, 1 E. D. Smith, 536; *Nickerson* v. *Ruger*, 76 N. Y. 279, 283; *Avery* v. *Slack*, 17 Wend. 85, 87; *Worrall* v. *Parmalee*, 1 N. Y. 519; *Gates* v. *Ward*, 17 Barb. 424; *Anderson* v. *R., W. & O. R. Co.*, 54 N. Y. 334, 342.) Plaintiff contends that the error in question can only affect the fourth element of the judgment, viz., the award of money damages, since, as he alleges, his right to an injunction is absolute and the determination of the amount of the alternative is an extra judicial act not subject to appellate review or correction. This is untenable. (*Henderson* v. *N.*

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Y. C. & H. R. R. R. Co., 78 N. Y. 423, 430; *Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 id. 98, 118; *Story* v. *N. Y. E. R. Co.*, 90 id. 122, 148, 171, 179; *Pond v. M. E. R. Co.*, 112 id. 189, 190; *Tallman* v. *M. E. R. Co.*, 121 id. 119, 125; *Abendroth* v. *M. R. Co.*, 122 id. 1, 17; *N. Y. E. R. Co.* v. *F. N. Bank*, 135 U. S. 432, 440; *Taylor* v. *M. E. R. Co.*, 18 J. & S. 311, 322, 328; *S. A. R. Co.* v. *M. E. R. Co.*, 56 Hun, 182, 185; *People* v. *A., etc., R. Co.*, 24 N. Y. 261; *Olcott* v. *Supervisors*, 16 Wall. 678; *U. P. R. Co.* v. *Hall*, 91 U. S. 343; *State* v. *H., etc., R. Co.*, 29 Conn. 538; Laws of 1875, chap. 606, § 26; *Powers* v. *M. R. Co.*, 120 N. Y. 178; *Ode* v. *M. E. R. Co.*, 56 Hun, 199; *Brush* v. *M. R. Co.*, 26 Abb. [N. C.] 73; *Smith* v. *City of Rochester*, 92 N. Y. 477, 487; *Glover* v. *M. R. Co.*, 19 J. & S. 1; *M. Society* v. *B. E. R. Co.*, 46 Hun, 530; *Vick* v. *City of Rochester*, Id. 607; *Lohman* v. *S. P., etc., R. Co.*, 18 Minn. 174; Pom. Eq. Juris. § 109; *Worrall* v. *Munn*, 38 N. Y. 137, 142; *Lahr* v. *M. E. R. Co.*, 104 id. 268, 293; *Hussner* v. *B. C. R. Co.*, 114 id. 433; *Shaw* v. *Stone*, 1 Cush. 228, 243; *McKeon* v. *See*, 51 N. Y. 300; *Cromwell* v. *McLean*, 123 id. 474, 484; *Jackson* v. *Van Slyke*, 52 N. Y. 645; *H. Ins. Co.* v. *W. T. Co.*, 51 id. 93; *Wangler* v. *Swift*, 90 id. 38, 45; *Helch* v. *Reinheimer*, 105 id. 470, 473; *Ormsby* v. *V., etc., M. Co.*, 56 id. 623; *Thomas* v. *Bartow*, 48 N. Y. 193; *N. A. R. Co.* v. *N. Y. E. R. Co.*, 3 Abb. [N. C.] 347; *Mattlage* v. *N. Y. E. R. Co.*, 67 How. Pr. 232; *Goodwin* v. *C., etc., C. Co.*, 18 Ohio St. 150; *McAulay* v. *W. R. Co.*, 33 Vt. 311; *B. R. Co.* v. *Grace*, 13 N. E. Rep. 680; *St. Julien* v. *R. Co.*, 35 La. Ann. 924; *Scudder* v. *T., etc., Co.*, 1 N. J. Eq. 694; *B., etc., R. Co.* v. *Strauss*, 37 Md. 237; *E. R. Co.* v. *D., etc., R. Co.*, 21 N. J. Eq. 283; *Andrews* v. *F. L. & T. Co.*, 22 Wiss. 288; *Logansport* v. *Uhl*, 99 Ind. 531; *Griffin* v. *A., etc., R. Co.*, 70 Ga. 164; *P., etc., R. Co.* v. *Jackson*, 21 Fla. 146; *F. B. Co.* v. *Dodge County*, 6 Neb. 18; *W. U. T. Co.* v. *Judkins*, 17 Ala. 428; Story's Eq. Juris. 388, 389; Pom. Eq. Juris. § 817; *Newman* v. *M. E. R. Co.*, 118 N. Y. 618; *In re N. Y., L. etc., R. Co.*, 27 Hun, 151; *In re N. Y., W. S. & B. R. Co.*,

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29 id. 609; *In re B. E. R. Co.*, 28 N. Y. S. R. 627; *In re U. E. R. Co.*, 8 id. 813; *In re K. C. E. R. Co.*, 35 id. 367; *Doyle* v. *Metropolitan E. R. Co.*, 29 id. 139; 32 id. 72; *Werfelman* v. *M. R. Co.*, Id. 682; *Jefferson* v. *N. Y. E. R. Co.*, 11 N. Y. Supp. 488; *Mattlage* v. *N. Y. E. R. Co.*, Id. 482; *Gray* v. *N. Y. E. R. Co.*, 12 id. 542; *Welsh* v. *N. Y. E. R. Co.*, Id. 545; *Foote* v. *Beecher*, 78 N. Y. 155; *Holcomb* v. *Holcomb*, 95 id. 316, 329; *Hubbell* v. *Schreyer*, 4 Daly, 362, 382; *Schoonmaker* v. *Wolford*, 20 Hun, 166; *Church* v. *Kidd*, 3 id. 254; *Varnum* v. *Hart*, 14 N. Y. S. R. 140, 147; *Doty* v. *Stanton*, 18 id. 427; *Rogers* v. *Wheeler*, 6 Lans. 420; *Smith* v. *Cross*, 90 N. Y. 549; *Sanford* v. *Ellithorp*, 95 id. 48; *Carroll* v. *Deimel*, Id. 252; *Marsh* v. *McNaier*, 99 id. 174; *Nugent* v. *Jacobs*, 103 id. 125.)

Henry H. Man for respondent. The evidence of expert witnesses was competent as to the diminution of fee and rental value. (*Clark* v. *Baird*, 9 N. Y. 183; *People* v. *McCarthy*, 102 id. 639; *Krum* v. *Beach*, 96 id. 407; 1 Whart. on Ev. § 450; *In re City of Rochester*, 40 Hun, 588; *Kenkele* v. *M. R. Co.*, 55 id. 398; *Vanderberg* v. *B. & A. R. R. Co.*, 2 Wkly. Dig. 474; *Hine* v. *N. Y. E. R. R. Co.*, 36 Hun, 293; *Reed* v. *R., W. & O. R. R. Co.*, 48 id. 231; *Shaw* v. *City of Charleston*, 2 Gray, 107; *Shattuck* v. *S. B. R. R. Co.*, 6 Allen, 116; *Swan* v. *Middlesex*, 101 Mass. 173, 178; *Snow* v. *B. & M. R. R. Co.*, 62 Me. 230; *W. D. C. I. Co.* v. *Sassaman*, 67 Penn. St. 415; *Carter* v. *Thurston*, 58 N. H. 104; *Sigafoos* v. *Mineapolis*, 36 Am. & Eng. R. R. Cas. 675; *Portland & R. R. R. Co.* v. *Inhabitants*, 23 id. 51; *Yost* v. *Curry*, 92 Ind. 469; *G. & S. W. R. R. Co.* v. *Haslam*, 73 Ill. 494; *K. & E. R. R. Co.* v. *Henry*, 79 id. 290; *City of Chicago* v. *McDonough*, 112 id. 85; *Colvill* v. *S. P. & C. R. Co.*, 19 Minn. 283; *Sherman* v. *S. P., M. & M. R. Co.*, 30 id. 227; *Lehmicke* v. *S. P., S. & T. F. R. R. Co.*, 19 id. 464, 481; *Snyder* v. *W. U. R. R. Co.*, 25 Wiss. 60; *T. T. Co.* v. *Forke*, 2 Tex. 365; *Texas & S. L. R. Co.* v. *Kerby*, 44 Ark. 103; *Railroad* v. *Foreman*, 24 W. Va. 673; *Dunsback* v.

Hollister, 49 Hun, 352.) There can be no reversal in this case, even if expert testimony as to diminution of value be held incompetent. (*Crawford* v. *M. E. R. Co.*, 120 N. Y. 624.)

PECKHAM, J. The principal question in this case is in regard to the admissibility of the opinions of experts in reference to the amount of damages sustained by the plaintiff by reason of injury to his easements of light, air and access to his property in Third Avenue, in the city of New York, caused by the building and operation of the defendants' railroad. As the question is one of considerable importance and arises in each one of this class of cases, and as the number of such cases tried and to be tried is as we understand very large, a critical examination of the question is called for. It will be well to have a clear view of the facts existing at the time the questions in controversy were put to the witness, so that we may determine understandingly the precise point in issue.

It appears that the plaintiff in November, 1852, became the owner in fee of the premises in question, which consisted originally of six lots on the east side of Third avenue and on the south side of Ninety-ninth street, but the plaintiff subsequently sold some, leaving himself with a frontage of about 100 feet on Third avenue and about 110 feet in depth. These lots cost the plaintiff about $500 apiece at the time he purchased them, at which time they were vacant, and they so remained until 1865, when the plaintiff leased them for $150 per year.

The tenant erected a house upon the corner lot, with a stable, which buildings were destroyed by fire about 1877, at which time the tenant gave up his lease and the lots remained vacant until 1881. In the meantime the plaintiff filled them in and graded them. Before filling in, the premises formed a portion of a marsh or swamp over which the tide ebbed and flowed. In 1881, the plaintiff sold these lots under a contract for $40,000, and the purchaser commenced the erection thereon of the present buildings, five in number, four of which front

on Third avenue and the fifth on Ninety-ninth street, each house being four stories high, constructed of brick, with brown stone trimmings. The buildings are about 47 feet front elevation and 65 feet deep and cost about $11,000 each. The purchaser had them substantially enclosed and the plastering nearly completed in the spring of 1883, when the plaintiff foreclosed his liens thereon and took them from him and completed them, so that they were ready for occupancy in the fall of the year 1883. Since the month of October, 1883, the buildings have been leased to tenants and the rents actually collected from the Third avenue buildings from January 1, 1884, to January 1, 1889, have been from one house and lot $7,053; from the second $6,129.11; from the third $7,554.50; from the fourth $7,541.66.

The defendants' railroad was constructed in Third avenue in front of plaintiff's lots in the year 1878, and was put in operation in December of that year. The plaintiff in his complaint alleged that the building of the railroad was unlawful, and that the unlawful construction thereof interfered with his access to his premises and impaired his easement in the street or avenue by depriving him of a large portion of light and air and of facility of access to them in the amount of $75,000, and by reason of the maintaining and operating and managing of defendants' railways, the value and the use and enjoyment of his premises, he alleged, had been depreciated and diminished to the amount of $5,000 per annum. He demanded judgment against the defendants restraining them from operating their road through Third avenue in front of his premises, and also from continuing the unlawful acts set forth in his complaint, and he asked that the damages he had sustained down to the commencement and during the pendency of this action be adjusted by the court, and that he might have judgment therefor against the defendants, and each of them, and such other relief as should be just and equitable.

The defendants joined issue with the plaintiff in regard to many of his allegations and set up that the defendants were

organized under the laws of the state of New York, granting them the right to use the street in question for the purpose of building their railroad, and that they had built it and equipped it and used and operated it under such acts of the legislature and in the most careful and skillful manner in which it was possible to construct, use and operate the same in the street mentioned in the complaint.

Upon the trial of the action, the plaintiff was a witness, and after stating the condition of the premises, and the fact that he had erected or caused to be erected buildings upon them at an expense of about $11,000 each, he said that he had offered the whole premises for sale, including the house on Ninety-ninth street, about two years previous, which would have been in the fall of 1887, for the sum of $105,000, and in his judgment, that was a fair price for them. Here is certainly a very large appreciation in value over the original cost. Would it have been as much if the railroad had not been built?

It will be seen that the present buildings were not erected until some two years after the building of the road had been completed and the operation thereof commenced. Whether the value of the property would have been still greater without the road than it now is with it, was the fact to be found by the court.

Upon the trial a witness was called on behalf of the plaintiff and testified that he was a real estate broker and had carried on that occupation in the city of New York for twenty-eight years; his transactions had extended throughout the whole city and had involved both leasing and selling; he knew the property in question and was familiar with the value of that property and of the property in the neighborhood; he had made an examination of the property with a view of seeing what the physical effects to the abutting property were, produced by the railroad and its trains, commencing at least six months ago, on four or five different occasions; he had given special attention to the effect upon abutting property produced by the elevated railroad and the passing of its trains; he had been examined a large number of times as

a witness on the subject and in reference to property scattered all over the city; he had made it his business to be familiar not only with the selling but the rental values of property along Third avenue since the railroad came there; he had informed himself about such transactions, not only in reference to this property, but other property; so far as experience from personal transactions was concerned he had none in that vicinity since the building of the railroad, in renting or in selling; he had been engaged by property owners for the last three years to make examinations and testify as an expert witness, and it had been a considerable part of his business, and in every case in which he had testified he had testified against the railroad company; he was paid $100 to come and give these opinions; he did not know but that the property at the upper end of Third avenue had been benefited to some extent; his opinion was that rapid transit had helped Harlem; the building up of the upper end of Harlem had been due to the growth and filling up of all the cross streets; the growth and filling up of the cross streets had been due to the rapid transit afforded by the elevated railroad in large part.

The following question was put to him: "To what extent, if at all, in your judgment, is the value of Mr. Roberts' four buildings on the Third avenue — excluding from consideration the house on Ninety-ninth street — to what extent, in your judgment, is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?"

Under objection and exception the answer was permitted and the witness stated that the diminution extended from about $110,000 to $80,000, including the loss to the fee value simply.

The court then said: "That is, you think that the four houses fronting on Third avenue are worth $80,000 now?" Witness: "Yes, sir." Court: "And that they would be worth $110,000 if the structure and road were not there?" Witness: "Yes, sir." Q. "What do you estimate the rental value of the property to be, the railroad not being there? I refer to the Third avenue front only."

Same objection and exception. Answer: "$9,000." Q. "And the railroad being there?" A. "$6,400, as collectable rents, I mean."

Upon this appeal the question is, were these objections of the defendant properly overruled?

By resorting to a court of equity and seeking the aid of such court to prevent the operation of the defendants' road until all his damages consequent upon the illegal construction of its road in front of his premises have been paid once for all, the plaintiff has brought before the court the question what were the damages to the fee of the premises owned by him, consequent upon this wrongful act of the defendant? The amount of damages thus caused to plaintiff's fee is the precise question which the court or jury must determine, and for such amount the court gives judgment upon condition of the plaintiff executing a deed to the defendant of the property wrongfully taken or interfered with by it.

The first question asked of this witness, to which exception is taken, as above noted, calls for his opinion as to the amount of such damage, and the second question is of substantially the same nature, except that it refers to the injury to the rental value of the property instead of the injury to the fee. The precise and specific question which is to be determined by the court and jury is by this interrogatory placed before the witness for his opinion and decision. To permit it to be asked and answered is beyond all question against the great mass of authority in this and other states.

It is now asked that this court, in view of the alleged abnormal character of the litigation growing up in the city of New York over the erection and operation of these elevated railroads, shall sanction in regard to them a departure from well established rules of law touching the admission of expert evidence. It seems to me that neither the nature nor the extent of the litigation affords the slightest justification for such departure.

Expert evidence, so-called, or, in other words, evidence of the mere opinion of witnesses, has been used to such an extent

that the evidence given by them has come to be looked upon with great suspicion by both courts and juries, and the fact has become very plain that in any case where opinion evidence is admissible, the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. We have said lately that the rules admitting the opinions of experts should not be unnecessarily extended, because experience has shown it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable, and leave the jury to exercise their judgment and experience on the facts proved. As is stated by EARL, J., in *Ferguson* v. *Hubbell* (97 N. Y. 507), "It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts."

It is the general rule that testimony should consist of facts and not opinions, and the admission of opinions forms an exception to that general rule. Mr. Justice COWEN said, in speaking of the opinions of witnesses as to the then present value of real estate, that they were barely admissible and that to receive them at all was a departure from the general rule of evidence, and that judges who preside at *nisi prius* sometimes have reason to regret that they should in practice form an exception. He referred to *Rochester* v. *Chester* (3 N. H. 349, 364–366), where the court refused to receive the opinions of witnesses as to the value of land, even from those skilled in the market. They said the land must be described and the jury must then judge from the facts. (See *Matter of Pearl Street*, 19 Wend. 654.)

I refer to this not for the purpose of throwing any doubt upon the admissibility of expert evidence upon the question of the past or present value of real estate, where the witness is shown to be competent to give an opinion thereon. That was decided years ago by this court, and has been continuously approved since that time (see *Clark* v. *Baird*, 9 N. Y. 183), but I cite it for the purpose of showing the opinion of learned judges regarding evidence of this kind when it first came into practice, and the questions thereon first came up for decision.

Opinion of the Court, per PECKHAM, J.

The only inquiry here is whether this is one of those cases in which the testimony is allowable.

The precise question has been decided by this court as lately as the 117th N. Y. Rep. 219, in *McGean* v. *Manhattan Railway Co.* The question there asked was, "What would have been the fair rental value in the years 1879, 1880 and 1881 if the railroad had not been built?" And we decided it to be improper. It was so held because it is merely speculative, and it is speculative upon the very question and upon the only question which the court or the jury is called upon to decide, and the question calls for the opinion of the witness upon that very subject. Some criticism has been made in regard to that case by the learned counsel for the plaintiff herein, and we are asked substantially to review it and to reverse our decision therein. We have carefully considered the arguments of counsel on both sides and have again looked through the cases decided in this court upon the subject, and we are unable to see that there has been any error in the *McGean* case, but, on the contrary, we think it is in strict conformity with the law as heretofore laid down by this court.

I shall refer to but a few of the cases cited by the appellant herein to sustain his claim that the court below erred in admitting the question in controversy. They are all contained in his very voluminous brief upon the subject submitted to us, and out of them the following are all I deem it necessary to comment upon. *Morehouse* v. *Matthew* (2 N. Y. 514) was an action brought by the plaintiff to recover damages for a breach of contract by the defendant in not feeding to the plaintiff's cattle as good hay as had been agreed upon. The plaintiff asked a witness what damage had occurred in consequence of feeding the cattle upon the hay in question instead of that agreed upon. Under objection, the witness answered he thought the damage would be fifty dollars. This court reversed the judgment on the ground that the evidence had been erroneously admitted, and that the question called simply for the opinion of the witness as to the amount of damage sustained by the plaintiff.

Opinion of the Court, per PECKHAM, J.

Van Deusen v. *Young* (29 N. Y. 9) was an action under the Revised Statutes to recover treble damages for cutting trees on a certain piece of land owned by the plaintiffs, who were remaindermen subject to a life estate. A witness was asked, What, in your opinion, is the difference in value of the farm by the removal of the timber? and also, Would the farm be worth more or less with the timber cut off? DAVIES, J., held the questions were objectionable as calling for a speculative opinion, and not for facts, and referred to *McGregor* v. *Brown* (6 Selden, 114); and MULLIN, J., said: "It was unquestionably competent for the witness to give his opinion as to the value of the farm with the timber on, and its value after it was taken off. The difference between the two may be the damages, and in cases where the damages are arrived at by merely subtracting one sum from another, it may seem to be refining overmuch to refuse the witness the right to make the subtraction himself and declare the result; for this is what he is called on to do when asked to give his opinion as to the amount of damages." The learned judge was speaking of a case where the witness knew the farm in question — knew it when the timber was on it and knew what its value then was, and the timber having been cut off, he knew what the value of the land was with the timber thus cut off. And yet in a case where the difference between the two would be the legal damages, it does not even then follow that a witness may be asked the bald question, "What amount of damages has the plaintiff sustained?" The reason is that the rule of damages is a question of law, and the witness, upon such a question, might adopt a rule of his own and hold the defendant responsible beyond the legal measure. In *Mardly* v. *Shults* (29 N. Y. 346), the court, per DENIO, J., held that a witness could not be allowed to state his opinion of the amount of damages. That was in an action for damages for raising a dam so as to overflow the plaintiff's house. The learned judge said the witness could describe the character of the overflow and its effect, and then it would be for the jury to estimate the damages; that what was offered was in substance an opinion as to the amount of

the damages which the plaintiff had sustained by the wrongful act of the defendant.

This court, in *Green* v. *Plank* (48 N. Y. 669), in an action of replevin for a canal boat, reversed the judgment for the plaintiff where the witness had been asked to state the damages for taking and withholding the boat during the time the defendant had it. In *Ferguson* v. *Hubbell* (*supra*), which was an action for damages for a fire, claimed to have been negligently set, from which the plaintiff sustained damage to his land, a farmer was called as a witness for defendant and asked the question, "What do you say as to whether it was a proper time or not to burn a fallow?" The testimony was said to have been erroneously admitted.

In *Van Wycklen* v. *City of Brooklyn* (118 N. Y. 424), the question of the admissibility of expert evidence is discussed and held to be allowable only when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form a correct judgment thereon, and no better evidence than such opinions is attainable.

In *Avery* v. *N. Y. Central, etc., Co.* (121 N. Y. 31), which was an action for damages on account of the violation of a covenant to keep a proper opening from the defendant's depot yard, opposite the plaintiff's hotel, the plaintiff was asked this question: "Do you know what the rental value of your Continental property, real and personal, would have been between the 10th day of September, 1881, and the 28th day of January, 1884, if there had been a sufficient opening kept and maintained by the defendant opposite your hotel, for the convenient access of passengers and their baggage to and from the twenty foot strip of land lying south of the hotel?" This evidence was held to be improper. Judge GRAY, in delivering the opinion of this court, said: "The witness should not have been permitted to give his opinion upon that head. His testimony should have been confined to stating facts. He might have described the condition of his property. He could have given evidence of what the defendant did to or upon the land over which he claimed to possess rights. He could have

stated what his business was and what it amounted to at times prior and subsequent to any change in the situation and circumstances surrounding its conduct; and it would then be for the jury to draw the conclusions from the facts stated as to whether plaintiff had been injured by the defendant and what amount of damages he should recover."

In *Norman* v. *Wells* (17 Wend. 136), it was held by the old Supreme Court that the amount of indemnity, when it is not capable of being reached by computation, is always a question for the jury. It was stated that if there be any rule without exception, it is this, and the court was unable to find any instance where the opinion of a witness had been received upon that particular question. The action was on covenant for damages to the plaintiff by the erection of another mill on the same stream with plaintiff's mill, and a witness was asked the damages which in his opinion the plaintiff had sustained by reason of the erection of such mill. The question was allowed at Circuit and a new trial was granted for the error in allowing it. The learned counsel for the plaintiff has cited a number of cases on his side, which he claims are authorities for the question put to the witness herein. The briefs of both counsel exhibit untiring industry and research, and all the cases that have been decided involving questions of this nature both in this and other states would seem to have been found and cited on the one brief or the other. It is impossible to notice them all, and I shall not make the attempt. Special reliance seems to have been placed by the learned counsel for the plaintiff upon the cases I now refer to. In *Clark* v. *Baird* (9 N. Y. 183), the point decided was that the opinions of a witness acquainted with real estate, the value of which was in dispute, were competent upon the question of such value. It was an action on the case by the purchaser of a tavern stand against his vendor for fraudulently misrepresenting the boundaries of the land. A witness for the plaintiff testified that he had examined the tavern stand with a view of buying it and that "it was worth $1,000 if it extended to the race and trees. The strip taken off would reduce it one-fourth." This testimony

was objected to on the ground that the amount of damage could not be ascertained by the opinion of the witness. The objection was overruled and the defendant excepted. Part of the alleged fraud consisted in the statement that the tavern stand extended to the race and trees. The plaintiff claimed as matter of fact it did not extend so far. The learned judge in the course of his opinion said that the witness had in substance stated the value of the stand, including all the land it was represented to include, and also in contrast with that statement, and as bearing upon the question of damages, had further stated the value of the stand excluding that part which, as the plaintiff contended, did not pass by the defendant's conveyance to the plaintiff by reason of his want of title. I do not see that the case affords any countenance for the claim of the plaintiff herein. The witness simply stated the value of the tavern as it stood, estimating that a certain amount of ground in plain view was attached to the stand, and then stated what in his opinion was the value of the land with that particular piece of land not included. Within any rule regarding the opinions of experts we think this evidence admissible.

In *Rochester & Syracuse R. R. Co.* v. *Budlong* (10 How. Pr. 289), which was a proceeding by plaintiff to take defendant's property by the right of eminent domain, the opinion of the General Term of the Supreme Court was delivered by Judge SELDEN in 1854. It contains expressions which favor the views contended for here by plaintiff's counsel and it includes all that can be said in favor of the admission of this kind of evidence. The opinion has not been followed by the courts of this state, and many subsequent decisions of this court, some of which have already been cited, are at war with the doctrines announced by Mr. Justice SELDEN. The case cannot be regarded as authority in this state at the present time. (See *Harpending* v. *Shoemaker*, 37 Barb. 270; *Simons* v. *Monier*, 29 id. 419.)

In *Hine* v. *N. Y. Elevated R. R. Co.* (36 Hun, 293), which was an action brought to recover damages for the obstruction of light, air and access to the plaintiff's premises by reason of

the construction of the defendant's road, a real estate broker was called on the part of the defendant, who, after stating that he was familiar with the premises in question, was asked this question: "What has been the effect in your opinion of the elevated railroad upon the value of the property, so far as the items of light, air and access are concerned?" Upon the plaintiff's objection the question was excluded and the court held that this was error. The court in the course of the opinion, which was delivered by DAVIS, P. J., said that "the answer to the question should have been received. The witness was an expert and that fact was sufficiently shown to entitle him to express an opinion on the subject. The opinion called for related to the precise question of damages which, as will be seen, the court submitted to the jury, and there is no reason why the opinions of experts are not admissible upon those questions." No case is cited in the opinion and what I have quoted is all the learned judge said in regard to the admissibility of evidence of this kind. The case is not in harmony with the cases in this court and should not be followed. The evidence is open to all the objections spoken of, in that it puts the witness in the place of the court and jury, and is only his opinion upon the very point to be decided by them.

In *Kenkele* v. *Manhattan Railway Co.* (55 Hun, 398), an action similar to the one at bar and where as here the defendant had neglected to take proceedings to condemn the property of the plaintiff, the General Term of New York held that the measure of damages was the difference at the time of the trial between the value of the property to which the easements were appurtenant, with the easements, and its value without them. The manner of proving such difference was not discussed. Mr. Justice VAN BRUNT in the course of his opinion in that case, after stating what he regarded as the true rule of damages, said: "We do not think that the Court of Appeals has as yet condemned the rule. Until they do, justice seems to require that it should be followed." It is stated as one of the grounds for the motion for a new trial in that case, that incompetent evidence upon the subject of damages had

been given, but it does not appear what that incompetent evidence was. The learned judge said: "The evidence as to the value of these easements is necessarily, from the very nature of the case, somewhat conjectural, and stringent and strict rules are not to be applied where they would deprive the owner of all proof of damage, as we are dealing with the damage done by a trespasser; and, while damages should be proven with reasonable certainty, the rights and interests of the owner of these easements should not be sacraficed."

. That is undoubtedly true. Continuing the learned judge said: "What more certain evidence of the value of these easements can be given than by proof of what the property to which they are appurtenant would now be worth with the easements, and what it is worth without these easements?"

Evidence as to what the value of the property would be with the easements alluded to unaffected by defendant's acts, is proper. No dispute arises on that point. The controversy arises when the fact of that value is to be sworn to as an opinion by a so-called expert, and which opinion, speculative and uncertain as it must be, is directed to the very point which the jury is to determine. Evidence upon the subject of this speculative value, a value which in fact does not and cannot exist, should be confined to those facts which the court shall hold to be material for a fair and intelligent judgment and then the inferences to be deduced from them may be drawn just as well by the jury as by the expert, and in all probability much more fairly.

This case is one where the facts which form the basis of opinion can be specified and should be stated, and the inference to be drawn from those facts should be drawn by the court or by the jury.

A sufficient number of cases has been cited on both sides, I think, to place fairly before us the different reasons for the different views which would exclude or permit evidence of this nature to be laid before a jury. There can be no doubt, as I have already observed, that the great weight of authority both in the Supreme Court and in this court is against the introduc-

tion of this evidence. And, indeed, there is no reason why it should be introduced. Expert evidence of the actual value of real estate is proper and in many cases essential. The present value of the property of the plaintiff can be proved by expert evidence, both the value of the fee and the rental value. Both classes of value could also be proved by expert evidence, as of a time immediately prior to the building of this road. They are opinions based on facts which now exist or which once existed, and if the expert have knowledge of them, he should be permitted to state it. As to what the value would have been under circumstances which never existed, he knows and can know nothing, but must form an opinion wholly speculative in its nature, which opinion must be based upon data perfectly easy for him to state, and from which when once stated, an ordinarily intelligent jury can draw as just and fair an inference of a possible yet conjectural value as could the expert. And that very inference must in some way be drawn by the jury, for it is the question it is called upon to decide. The opinion of the expert, if of the least value, would have to be based upon an intelligent consideration and knowledge of the value of other property as nearly as may be similarly situated, in about the same quarter of the town and under nearly the same circumstances, but without the presence of a railroad of the nature of the defendant's in front of the property. All this information he could easily impart to the jury.

Proof might be made of the filling up of the side streets along the lines of this railroad and of the incoming of a large population, the erection of buildings somewhat similar to plaintiff's and their rental and fee value, and finally a general statement of the condition and value of property in the neighborhood of that in question could be proved. All these facts would be of service in determining the question to be submitted to the jury. When they are all stated and past and present values proved, the jury or the court will then be as fully competent to draw the inference which it is its peculiar province and duty to draw as the expert. This special question is one which all admit is to some extent and in all cases a matter of

conjecture and speculation. How much the appreciation of property is itself due to the erection of the road and the consequent filling up of the neighborhood opened by it, and whether the property without the construction of the road would ever have become as valuable as it is, are questions which, when these various data have been given, can be speculated upon as well by the judicial tribunal as by the hired expert. It is none the less conjecture and speculation because the expert is willing to swear to his opinion. He comes on the stand to swear in favor of the party calling him and it may be said he always justifies by his works the faith that has been placed in him.

This case is a good illustration of what may be almost termed the wholly worthless character for any judicial purpose of the testimony on both sides upon this one point, as to what would be the value of this property if this railroad had not been built. The experts on the part of the plaintiff guessed that it would have been $30,000 more valuable, while those on the part of the appellant, equally intelligent it would seem, and equally honest, thought that the value of the property would have been less than at present if the railroad had not been built. The court is not in the least aided by the various guesses of these hired experts. If the facts upon which these gentlemen based their guesses are placed before the court, more exact justice will, in my judgment, be the result if their speculations be excluded, and all speculation as to the damage sustained by a plaintiff be confined to the court and drawn entirely from the evidence in the case.

It is urged, however, on the part of the plaintiff that even if this question were objectionable, yet the fault was cured by the questions put by the court, in response to which the witness said that the four houses fronting on Third avenue were worth $80,000, and would have been worth $110,000 if this structure and road were not there. If the objection were only to the form of the question, that which was made use of by the court would probably have cured the difficulty. But it is no objection to form that I have been discussing. The

objection is to the substance of permitting the witness to state what in his opinion would have been the value of this property at this time, in case the railroad had not been built and operated. This objection was not cured by the alteration of the form of the question.

It is also claimed that there was sufficient evidence, excluding entirely the evidence of experts under the ruling of the court, upon which this judgment may be sustained. There is some other evidence in the case, but what would have been the result if all this objectionable evidence were eliminated it is impossible for this court to determine. We went to the very extreme limit in upholding the judgment in the *McGean* case, but there the evidence was much more minute and the objectionable evidence seemed to have been objected to on grounds other than its absolute incompetence. We thought it was doubtful whether the objection specifically and pointedly raised the question. The objection in this case is not only that it was incompetent, but the question was objected to on the ground that it was for the court alone, and not for the witness to determine the amount of damage. We think the objection was sufficiently exact to raise the question that has been discussed here.

Lastly, it is alleged on the part of the plaintiff that even assuming error, it is not prejudicial to the defendant because the defendant is not bound to avail itself of the privilege granted it by taking a deed of the easement from the plaintiff upon the payment of the amount of the damages found by the court, but may submit to the injunction and in the meantime take proceedings to condemn the property. We do not think this contention can avail the plaintiff. The inquiry into the fee value of the plaintiff's property is predicated upon the idea that the defendant is to take the property at the value found in order to escape the injunction which would otherwise issue, and indeed it would seem that the defendant would have not much choice in the matter, and that it would be substantially bound by the judgment to take the property at the value found by the court or jury. It is idle to talk about a company

situated like this corporation submitting to an injunction and ceasing to operate its road through the avenue for a single day. It might be questionable whether there would be the slightest justification for such stoppage, founded upon any allegation that the amount of damages awarded by the court was too great. At any rate the question was tried by both sides for the purpose of determining what the amount of damages really was, and the defendant has the right under the circumstances, where the investigation of such question was proper and material, to claim that it should be made upon competent and legal evidence, and where improper evidence is admitted to its damage it has the right to ask the court for relief.

Our conclusion is that for the error in the admission of this evidence the judgment should be reversed and a new trial granted, costs to abide the event.

GRAY, J. (dissenting). The errors presented by this record, and upon which the appellants insist as requiring the reversal of the judgments below, consist in the admission by the trial court of certain evidence adduced by plaintiff to show that the maintenance and operation by defendants of the elevated railroad were damaging to his property rights. Witnesses were called, who were qualified to speak from business experience, from familiarity with the values of real property in the city of New York, and who professed to be skilled, by reason of an especial study of the general effect upon abutting properties of the elevated railroads, and the exceptions arose upon the admission of their opinions in answer to the following questions: "To what extent, in your judgment, is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?" "What do you estimate the rental value of the property to be, the railroad not being there?" "To what extent, in your judgment, if at all, is the selling and rental value of this property * * * diminished by the presence on Third avenue of the elevated road and the operation of the passing trains?" To these questions the defendants interposed objections on several grounds,

the only one of which material here is that of the competency of such evidence, but the trial court, nevertheless, permitted the witnesses to answer.

The question which is thus brought prominently before us for decision is, only comparatively speaking, novel; but it assumes very great importance, because not only are the principles of evidence involved, but, as we are informed, a great number of the decisions in the courts below and many recoveries rest upon the theory that the admission of such evidence is necessary and proper in such cases. If we shall say that it is inadmissible, it must be because it is deemed contrary to the principles underlying the law of evidence and to settled rules. The point, which is mainly made against the competency of such evidence, is that it calls for the conclusions of the witness upon a matter which the court or jury should alone determine, and, hence, invades their province. It is also suggested that to allow such evidence is to permit speculation to supply proof. If the proposition were wholly true, it might be difficult to sustain the right of the plaintiff to submit his case to the jury upon such proof. But it seems to me that the argument against this species of proof is inapplicable to cases of this character; where evidence as to the damage suffered by the cutting land owner cannot always be furnished by exact data, or statements of facts, and where, to an intelligent judgment on the issue, expressions of opinions seem so necessary. Nor is it true that the evidence is forbidden by established rules, whether we consider that question upon its truth, or upon the principles of the law of evidence. These principles cannot be embodied in rigid and lifeless formulas, which by adaptation to new conditions in human affairs. They admit of expansion and of frequent exception, whenever it is needed, in order to demonstrate the truth. A different view of the law of evidence might be extremely subversive of justice. The law of evidence, as a system, is based both upon principles and upon rules, which, when not prescribed by statutes, arise out of precedents in decided cases. The rule is an exposition of the principle; and it is based upon judicial

experience in the investigation of controversies by means of testimony, and is necessarily influenced by what may be the existing condition of things. It is well, though somewhat elementary, to observe that in the application of the principles of the law of evidence to the investigation of the truth, in a controversy over an alleged matter of fact, the aim is to confine the proofs only within the bounds of what is competent and satisfactory evidence; and that by competent evidence is meant such as the nature of the thing to be proved requires, and that by satisfactory evidence is meant such as shall suffice to satisfy the unprejudiced mind. (1 Greenl. § 1.) If some rule of evidence is alleged to militate against the competency of the species of proof offered, I suppose that it should comply with two conditions, to satisfy the mind as to its force. It should appear that it was established upon a sufficient precedent, fitting the case, and that the nature of the thing to be proved did not require any exception to, or modification of, the supposed rule.

In this case the matter of fact, the truth of which is the subject of judicial investigation, is whether the maintenance by the defendants of an elevated railroad structure, and the operation of its trains upon the street in front of the plaintiff's premises, have caused any damage to him, by which the value of his property rights has been impaired. The controversy is over that fact and the question of the damage. Such a condition of things in the street is a new use and affects certain rights in and over the street, which are considered as appurtenant to the abutting lands. It constitutes a taking of the easements, which the property holder is legally, or beneficially, entitled to; and if he can establish that the acts of the defendants have caused damage to him, by depreciating the value which his estate in the abutting land would otherwise have, he is entitled to recover from them, as *quasi* trespassers, damages to the extent of the injury suffered by his estate.

It is very plain that the value of these easements cannot be arrived at by exact proof. Judge VAN BRUNT, in delivering the opinion of the General Term of the Supreme Court, in

Kenkele v. *The Manhattan Railway Company* (55 Hun, 398), well said: "How are we to arrive at the value of these easements taken by the defendant? To the plaintiffs they are of no value, except because of the enhanced value which they give to the property they own fronting upon the streets. By themselves they are worthless, have no intrinsic value." Hence, he reasoned that the more certain evidence of their value was in proving what the property would be worth with the appurtenant easements and what without them. I think that reflection and a careful consideration of the real bearings of the proof and of the circumstances of the case must induce the conviction that the evidence does not usurp the province of the court or jury, and that there are ample and cogent reasons for its admission.

The admissibility of opinions as proof of the marketable condition and value of property, where it is not practicable to give more definite knowledge, has been long settled and has formed one of the admitted exceptions to the rule which excludes the opinions of witnesses as evidence. (1 Greenl. on Ev. § 440a; *Clark* v. *Baird*, 9 N. Y. 183; *Robertson* v. *Knapp*, 35 id. 91.)

The ground of the exception is not because the persons who give such opinion evidence are superior in scientific capacity, or attainments, but because they are shown to have a knowledge of such matters which jurors have not, and the value of property is actually a mere matter of opinion. If, then, expert, or skilled, evidence is admissible to prove generally the value of real property, why should it be deemed inadmissible to prove its value under different circumstances; that is to say, not only what is its value as at present circumstanced, but what would be its value if circumstanced differently and under ordinary conditions of street uses? And why is an opinion not proper as to the extent of the damage, if any, to the value of the land, as being often the best attainable evidence? The mere objection of incompetency is no longer available to exclude opinion evidence, because upon the fact in controversy, in a case where more definite knowledge is not to be had. There is the

strongest reason for admitting the opinions of witnesses to prove the extent of damage sustained by reason of the defendant's acts, in the circumstances and necessities of the case. Without the aid of the opinions of persons experienced in the subject of real estate values in a metropolitan centre like New York, it would be rarely possible for the plaintiff to make a satisfactory or sufficient case for an intelligent judgment by courts or jurors. The values of real estate are fixed by and depend upon many considerations. The factors of value, in the particular locality, in the character of the neighborhood and in the tendencies of trade, or of residence, are indefinite and are not matters of common knowledge. A new and different use of the street may affect the growth in value of the city lot favorably, or adversely; but as to which way and to what extent is a matter largely of opinion, based upon study and experience, and not of exact knowledge from definite facts. It is not a matter requiring any particular intellectual attainments to understand, but it involves an acquaintance with affairs and the possession of knowledge, acquired through habits of observation and business, which must be essentially peculiar, and it would be stretching presumption rather far to assume that the knowledge is common to all persons. In the growth of a city and the increase of its business and wealth are causes for a steady enhancement of its real estate values, though its direction may be erratic and incapable of being foreseen. That the value of the plaintiff's property upon the Third avenue might be greater to-day than it was before the defendants built their railroad structure, if the street remained in its earlier condition, is a possible, if not a natural assumption. But it is a fact incapable of definite knowledge, and, plainly, as it seems to me, best ascertainable though the opinions of persons, whose familiarity with the neighborhood and habits of business observation in such respects could qualify them to speak to the issue.

The question before us is not like that of a trespass once committed upon property rights, where the value before the trespass and the value after its commission might sufficiently

express the facts, from which jurors could deduce conclusions as to any damage. Here the continuing trespass upon and the deprivation of appurtenant property rights introduce an element, the aggravation of which is to be considered in connection with possible general benefits conferred and in relation to municipal growth under normal or usual conditions. Whether the elevated railroad enhanced the values of the abutting property over what they would have become in its absence is a fact which is best and more intelligently determined from competent opinions.

An early and leading case in the reports of the decisions of this court is *Clark* v. *Baird* (9 N. Y. 183), which was an action on the case for fraud in misrepresenting the boundaries of property sold by defendant. The premises consisted in a tavern stand, and the representation made was that they extended to a certain mill-race and tree. A witness, who had examined the property with a view to purchase, was permitted, under objection, to testify that "it was worth $1,000 if it extended to the race and trees. The strip taken off would reduce it one-fourth." This testimony was objected to upon the ground that the amount of damage cannot be ascertained by the opinion of the witness. The opinion of the court was delivered by Judge A. S. JOHNSON, a most learned and able jurist, and was directed to the discussion and elaboration of the question of the competency of opinions upon such a question. This is clear from an observation of the judge, who said: "The evidence was pointed solely to the question of damages and the objection was undoubtedly understood by the court to relate to the competency of opinion upon the question of value." Many cases in this and other states were considered, and with such particularity as to render it quite unnecessary to repeat the labor here. The propriety of the evidence objected to was sustained upon the ground of necessity and of superior convenience. The opinion summed up a general discussion in this wise: "Upon this ground (*i. e.*, of necessity), as well as upon that of superior convenience and the constant reception of such testimony upon trials without objection, a tacit but

strong proof of its propriety, it must be deemed established that upon a question of value the opinion of a witness, who has seen the thing in question and is acquainted with the value of similar things, is not incompetent to be submitted to a jury."

In *Robertson* v. *Knapp* (35 N. Y. at p. 93) *Clark* v. *Baird* is referred to with approval, as authority for the rule that opinions are admissible "as to the value of property, in cases where the value was properly the subject of inquiry." The point of the objection in *Clark* v. *Baird* is precisely the same in principle, if not in its facts, as the one now presented.

In the early case of *Rochester, etc., Railroad Co.* v. *Budlong* (10 How. Pr. Rep. 289), which was decided in 1854, a year later than *Clark* v. *Baird*, the opinion of a witness was held competent to show what would be the injury to the appellant's farm, arising from the construction of the railroad, and what would be its diminution in value from the same cause. The General Term of the Supreme Court, at which the case was decided, was composed of Justices SELDEN, WELLES and JOHNSON, and the opinion was delivered by Justice SELDEN. The evidence was held admissible, upon the ground that unless questions involved a subject, knowledge of which is presumed to be alike common to all men, skilled opinions were proper.

The authority of these cases has sufficed for the views of courts in other states, though it must be admitted that judges have not uniformly agreed. Some of these cases are cited in the respondent's brief; but extended reference to them seems unnecessary. The proposition must commend itself upon obvious grounds of necessity and of right, as well as because it is sanctioned by authority in the courts of this state. But I may refer to some cases in the Supreme Court of Massachusetts, where the question has been pertinently discussed. In *Shattuck* v. *Stoneham Branch Railroad* (6 Allen, 115), where lands were taken for a railroad, testimony as to the amount of damage done to the petitioner's estate was allowed, upon the theory that where the amount of damages done to property is in controversy, opinions by persons acquainted with the value of the property may be given. It was there observed that, "as

value rests merely in opinion, this exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety;" and the opinion cites *Clark* v. *Baird* (*supra*). In *Swan* v. *County of Middlesex* (101 Mass. 173), where land was taken for widening a street, the admission of such opinions was justified upon like reasoning and "rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have, and that they are the most satisfactory and often the very best attainable evidence of the fact to be proved." It was there said: "The witnesses being competent to testify to the value of the land affected, before and after the alteration of the highway, might testify to the simple question of arithmetic which of those two values was the greater; in other words, whether the petitioner's estate was benefited or injured." (And see *Sexton* v. *North Bridgewater*, 116 Mass. 200.)

The decisions in our own state, which I have mentioned, have been relied upon by several text-writers. (See Lawson on Expert and Opinion Evidence, p. 451; and Rogers on Expert Testimony, § 152; and also Wharton on Evidence, § 450.)

In Roger's work it is remarked: "That there is no such inherent distinction between questions of value and questions of damages, if from the latter is excluded all idea of any legal rule or measure of damages, as brings the one within and the other without the province of the opinion of witnesses." And in Wharton's work it is remarked, with respect to the facts upon which a witness bases his opinion as to the depreciation in value, that "when, as is often the case, these facts can be best expressed by the damage they cause, then this damage and its extent may be testified to by witnesses." The following authorities are in point and may be referred to in connection with this discussion: *Snow* v. *Boston & Maine R. R. Co.* (65 Maine, 230, 231); *Keithsburg, etc., R. R. Co.* v. *Henry* (79 Ill. at p. 294); *White Deer, etc., Co.* v. *Sassaman* (67 Penna. St. 415); *Snyder* v. *W. U. R. R. Co.* (25 Wis. pp. 66, 70); *Lehmicke* v. *St. Paul, etc., R. R. Co.* (19 Minn. 464).

As against the weight of authority in the cases of *Clark* v. *Baird* (*supra*) and *Rochester, etc., Railroad* v. *Budlong* (*supra*), I find no case, since, in this court, which compels a different view.

Van Deusen v. *Young* (29 N. Y. 9) was an action of trespass for damages caused by cutting down and taking away trees from land, and a witness was asked "Would the farm be worth more or less with the timber cut off?" The impropriety of this question was deemed to exist in its being irrelevant to the issue and as calling for a speculative opinion. Clearly, this is not authority for the case at bar. Judge MULLIN, who delivered an opinion in the case, in discussing the competency of opinion evidence as to value, most pertinently says: "There are cases in which it is necessary to put to the witness the very question, how much damages the plaintiff has sustained by reason of the act or neglect of the defendant. These are cases in which no data can be given which could enable a jury to arrive at the measure of damages, because the amount of the damage is known and can be properly appreciated and measured only by persons of skill in the business or matter to which the damage in the case relates. For a full and accurate examination of the cases on the question, see *Clark* v. *Baird* (5 Seld. 183)."

Marcly v. *Shults* (29 N. Y. 356) was an action for damages for the overflowing of the plaintiff's land from a mill dam, and a question discussed related to the offer to ask the plaintiff, himself a witness, what the value of the use of the house was per annum before the raising of the dam. This was deemed objectionable because the value of the rent was not important, "except argumentatively." It was remarked, however, that "if the house had been kept for renting, and something in the nature of a market price for the use could have been proved, it might have been competent."

Teerpenning v. *Corn Exchange Insurance Company* (43 N. Y. 279), was an action on a policy of insurance for the loss of goods by fire, and cannot be deemed to be, either in facts or in principle, controlling. *Clark* v. *Baird* is there cited with

is observation, "that upon questions of value, the opinions witnesses are admissible, but with the qualification that the itnesses must have peculiar knowledge of the article in ques-n and its value."

I do not think other authorities cited from the decisions of s court call for discussion, until we come to the recent cases *McGean* v. *Manhattan Railway Company* (117 N. Y. 219) l of *Avery* v. *New York Central and Hudson River Rail-d Company* (121 id. 31).

The first of these cases might be deemed, upon a cursory sideration, decisive of a contrary view. The decision of case, however, did not turn, nor depend upon the point the competency of the evidence as to value, nor was the stion altogether the same as in the present case. There no discussion by counsel of the point, except in the brief ie appellant's counsel, and the case of *Clark* v. *Baird* was alluded to at all. The case was affirmed upon other con-ations; and, as our decision did not involve any necessary mination as to the principle of evidence in question, there valid or just reason why we should be limited in our nt discussion by the *McGean* case; especially when the becomes important and the determination of the ques-essential.

The other case of *Avery* v. *Railroad Company* the plaintiff witness and he was asked this question: "Do you know the rental value of your property, real and personal, have been, between the 10th day of September, 1881, e 28th day of January, 1884, if there had been a suffi-pening kept and maintained by the defendant opposite r hotel for the convenient access of passengers and their e to and from the twenty-foot strip of land lying south hotel?" The propriety of such a question was denied everal grounds. It was held that the witness had not own to be qualified to give such an opinion, and that stion assumed the insufficiency of the opening. It was t it was an attempt "to prove through the witness that prejudiced by the existing condition of things as to the

opening in the fence, and, under the guise of giving his knowledge, to elicit his opinion that the value of his business to him would have been greater if something different in the way of an opening had been maintained." Therefore, and on the strength of authorities mentioned in the opinion, the question was condemned as usurping the province of the jury. There was no question, nor discussion, as to the competency of expert evidence, or as to opinions of persons possessing a knowledge of a subject which, in its nature, is peculiar and cannot be assumed to be common to all. The plaintiff was conducting a hotel and a restaurant business, and was a lessee of the premises. Whether his business was injured or not was the subject of definite knowledge and capable of being testified to by exact data.

The present case, therefore, differs in its facts, as in its principles, from the cases relied upon, and is only appositely met by the authorities of *Clark* v. *Baird* (*supra*) and *Rochester Railroad* v. *Budlong* (*supra*). Here we have a new structure in the streets, which was a perversion of a street use, and which the legislature could not authorize, nor sanction, without providing for compensation to the abutting property owners for the value of the appurtenant easements appropriated, if shown to have a value to him greater than any particular benefit conferred upon his estate by the presence of the structure. How, in the nature of things, is such a matter susceptible of exact proof by facts? Is not the effect upon the plaintiff's estate from the presence of the defendant's structure and its operation of trains, and any damage sustained thereby, best shown by receiving in evidence the opinions of those persons, who, by reason of experience, observation and familiarity with the various and more or less inexact and indefinite causes, which operate upon real estate values, are skilled, or expert upon the subject? How can the value of the property, if enjoyed in a usual manner and if subjected to ordinary street uses, be ascertained except by way of such evidence?

There is no application of any new principle of evidence; *Clark* v. *Baird* is sufficient authority for the reception of

pinions in evidence upon questions of value and damage. But here is, in a changed and new condition of things, a new reason or the admission of expert opinions as to the extent of damage ustained by an abutting land owner from the presence of these levated railroads. This court has decided that this structure estroyed the ordinary use for which a street was intended, id appropriated certain easements of the abutting property vners, wherefore they should make compensation in damages r any injury which may be proved to have been suffered. not that injury, under the extraordinary circumstances of e case, more intelligently proved through the opinions of rsons shown to be competent to express such opinions? The witness' evidence does not conclude the court or jury, d it is still left to them to decide, with the aid of such lled opinions, as to the measure and the amount of damages ich should be awarded by way of compensation. And if witness is asked for his opinion as to the extent to which plaintiff's estate has been damaged, it seems an overnement of argument to deny the propriety of allowing him tate the result of a mere subtraction of the values assigned the premises with and without the structure. The judgnt of the court, or of jurors, is not limited to the opinions en, but is formed from the consideration they may give to evidence, and is simply aided by the information they may e derived from the skilled opinions in the case.

pon the grounds of superior convenience, of necessity and n obvious propriety, and if we would have intelligent and decisions of such issues, I think the evidence objected to is issible in such cases, and, therefore, that the judgment w should not be reversed for the errors alleged.

ll concur with PECKHAM, J., except RUGER, Ch. J., and Y, J., who dissent.

dgment reversed.

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ANNA MARIA DOYLE, Respondent, *v.* THE MANHATTAN RAILWAY COMPANY et al., Appellants.

In an action by an abutting owner to restrain the operation of an elevated railroad in a city street, the opinion of an expert as to what plaintiff's premises would have been worth without the road is not competent evidence.

It seems it is competent for such witnesses to give opinions as to the present and past value of property, based upon facts they have observed, but it is improper to permit them to speculate as to the facts and then base a speculative opinion thereon.

In such an action it is competent for either party to show the general effect of the operation of the road upon other premises abutting upon the street, in the vicinity of, and similarly situated with plaintiff's, where it appears that damages claimed by plaintiff, if actually sustained, must have been common in the vicinity along the street.

But *it seems* that while the court may not confine the examination to the premises in question and exclude all proof offered as to the general effect upon other premises, it may, in the exercise of its discretion, confine the examination to premises in the vicinity, giving a reasonable range, and may limit the number of witnesses.

It is competent also to prove, where plaintiff's premises are fitted and occupied in part for business purposes, the effect of the operation of the road upon the business and traffic in the streets.

It seems that in such case the witnesses should be confined mainly to giving observed facts, and that they should not be permitted to give mere speculative opinions.

(Argued April 24, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made January 5, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Samuel Blythe Rogers for appellants. The defendants had a right to require that the court's determination of the value of the easements should be upon legal evidence, and according

to the rules of law. (*Carter* v. *N. Y. E. R. Co.*, 25 J. & S. 279; *S. A. R. Co.* v. *M. E. R. Co.*, 56 Hun, 182.) The question of "fee damage" was an issue of the trial. (*Henderson* v. *N. Y. C. R. R. Co.*, 78 N. Y. 430.) Plaintiff, having voluntarily imported the question of "fee damage" into the case, and obtained an adjudication upon it, is estopped from denying that it was one of the issues of the trial. (*Helck* v. *Reinheimer*, 105 N. Y. 470.) If the court had determined the value of plaintiff's easements according to the rules of law, it might have found that there was no damage and no right to an injunction. (*Gray* v. *N. Y. E. R. Co.*, 35 N. Y. S. R. 32; *Brush* v. *M. E. R. Co.*, 26 Abb. [N. C.] 73; *Welsh* v. *N. Y. E. R. Co.*, 12 N. Y. Supp. 545; *Genet* v. *D. & H. C. Co.*, 34 N. Y. S. R. 247; *Elmhirst* v. *Spencer*, 2 M. & G. 45; *Kensit* v. *G. E. R. Co.*, L. R. [23 Ch. Div.] 566; *Cooper* v. *Crabtree*, 19 id. 193; *Jeffers* v. *Jeffers*, 107 N. Y. 650; *Morgan* v. *City of Binghamton*, 102 id. 500; *T., etc., R. Co.* v. *H. T., etc., R. Co.*, 86 id. 106, 123, 126; *People* v. *M. T. Co.*, 31 Hun, 596; *Drake* v. *H. R. R. R. Co.*, 7 Barb. 508; *Jerome* v. *Ross*, 7 Johns. Ch. 315; *Livingston* v. *Livingston*, 6 id. 497.) The learned trial judge erred in receiving the opinions of the witnesses as to what this property would have been worth if the railway had not been built. (*McGean* v. *M. R. Co.*, 117 N. Y. 432; *Coleman* v. *People*, 58 id. 555; *Starbird* v. *Barrows*, 43 id. 200; *People* v. *Ferdandez*, 35 id. 59; *Foote* v. *Beecher*, 78 id. 155; *Merritt* v. *Seaman*, 6 id. 168; *Holcomb* v. *Holcomb*, 95 id. 322, 323, 324; *Reed* v. *McConnell*, 101 id. 270; *Avery* v. *N. Y. C. & H. R. R. R. Co.*, 121 id. 31; *Thompson* v. *Dickhart*, 66 Barb. 604; *Gutwillig* v. *Zuberbier*, 41 Hun, 361; *Van Zandt* v. *M. B. L. Ins. Co.*, 55 N. Y. 179; *Martin* v. *N. Y., N. H. & H. R. R. Co.*, 103 id. 662; *Duff* v. *Lyon*, 1 E. D. Smith, 536; *Taylor* v. *M. E. R. Co.*, 18 J. & S. 311; 20 id. 299, 562; 23 id. 555; 53 Hun, 205; *Peyser* v. *M. E. R. Co.*, 13 Daly, 122, 127; *S. A. R. Co.* v. *M. E. R. Co.*, 56 Hun, 172; *Railway Co.* v. *McCloskey*, 110 Penn. St. 436, 444.) The learned trial judge erred in excluding evidence as to the course of trade and business on Sixth avenue. (*Drucker*

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v. *M. E. R. Co.*, 106 N. Y. 157; *Hobart* v. *Hobart*, 62 id. 80; *Holcomb* v. *Holcomb*, 20 Hun, 156; *City Bank* v. *Dearborn*, 20 N.Y. 244; *Starbird* v. *Barrows*, 43 id. 200; *Marston* v. *Gould*, 69 id. 220, 228; *Tooley* v. *Bacon*, 70 id. 34, 37; *Victor* v. *Bauer*, 11 N. Y. S. R. 531.) The learned trial judge erred in finding, as matter of fact, a great number of severe physical injuries caused by the railway, none of which were supported by even a scintilla of evidence. (Code Civ. Pro. § 993; *Bedlow* v. *F. D. D. Co.*, 112 N. Y. 263, 269; *Todd* v. *Mason*, 109 id. 316, 322; *Matthews* v. *Coe*, 49 id. 57.) The learned trial judge erred in permitting the plaintiff to testify what, upon the coming of the elevated road, she heard people say, who were examining the apartments with a view to hiring them, when they looked out of the front windows. (*Denise* v. *Denise*, 110 N. Y. 562; *Platner* v. *Platner*, 78 id. 90, 102; *Crippen* v. *Morse*, 49 id. 63, 67; *F. Bank* v. *Cowan*, 2 Abb. Ct. App. Dec. 88, 90; *Fowler* v. *H. M. Co.*, 20 Wkly. Dig. 521; *Redlington* v. *Gilman*, 1 Bosw. 235; 2 Rumsey's Pr. 304.) The learned trial judge erred in refusing to permit the plaintiff to be asked, upon cross-examination, whether she was willing to sell her property at the price her expert witnesses said it was worth. (*Dalrymple* v. *Hannum*, 54 N. Y. 654; *Thurber* v. *Thompson*, 21 Hun, 472; *McGrath* v. *R. R. Co.*, 63 N. Y. 522; *Hastings* v. *Stetson*, 130 Mass. 76; *E. B., etc., R. Co.* v. *Ranck*, 78 Penn. St. 454; *C. R. Co.* v. *Greely*, 23 N. H. 237, 242; *Langley* v. *Wadworth*, 99 N. Y. 61.)

G. Willett Van Nest and *Wheeler G. Peckham* for respondent. The plaintiff having a right to an injunction, no question arises in an appellate court as to the amount awarded for the fee damage, and no errors in admitting evidence in respect to fee damage are to be considered by this court. (*N. Y. N. Exchange* v. *M. E. R. Co.*, 21 J. & S. 511; *Lawrence* v. *M. E. R. Co.*, 12 N. Y. Supp. 546; *Carter* v. *N. Y. E. R. Co.*, 25 J. & S. 279; *Eno* v. *M. E. R. Co.*, 24 id. 313; *Lahr* v. *M. E. R. Co.*, 104 N. Y. 268; *Kane* v. *N. Y. E. R. Co.*, 26

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N. E. Rep. 278.) It was proper to exclude an answer to the question, "What is the result of your experience and observation in respect to the effect of the elevated railroad upon Sixth avenue?" (*Avery* v. *N. Y. C. & H. R. R. R. Co.*, 121 N. Y. 42; *Teerpenning* v. *C. E. Ins. Co.*, 43 id. 281; *McGean* v. *M. R. Co.*, 117 id. 223; *Tooley* v. *Bacon*, 70 id. 47; *Marston* v. *Gould*, 69 id. 228; Lewis on Em. Domain, § 487; *Sizer* v. *Burt*, 5 Den. 428; *Scattergood* v. *Wood*, 79 N. Y. 263; *Holender* v. *N. Y. C. & H. R. R. R. Co.*, 19 Abb. [N. C.] 18.) It was proper to exclude answers to the question, "Will you state whether the elevated railroad has caused any material or substantial interference with light, air and access in any of the buildings which you have occupied on Sixth avenue?" referring to buildings other than those in suit, and not to any buildings on any one of the corners of Fifty-third street and Sixth avenue. (*Peyser* v. *M. E. R. Co.*, 13 Daly, 127; *Railway Co.* v. *McCloskey*, 110 Penn. St. 444; *Murphy* v. *Brooklyn*, 6 N. Y. S. R. 47; *Gouge* v. *Roberts*, 53 N. Y. 619; *Pennsylvania* v. *Bunnell*, 81 Penn. St. 414.) The statement of the witness Olmstead was clearly the best evidence of the rent he paid, which is what he was asked. His answer conforms to Waterlow's statement of the rent, which was not objected to. (*Dart* v. *Laimbeer*, 107 N. Y. 664.) The objection to the question asked Waterlow, as to whether he had "formed an opinion as to what the value of the Doyle property would be to-day without the elevated road," required an answer merely as to whether he had formed an opinion, but this and the question asked Stevens as to the value the property would have were there no road, raise no question for this court. (*McGean* v. *M. R. Co.*, 117 N. Y. 222; *Dunscomb* v. *Hollister*, 49 Hun, 352; *Tallman* v. *M. E. R. Co.*, 121 N. Y. 122.) The rents received in 1874 for the property in suit were the best evidence of the rental value at that time. (*Moore* v. *Deyo*, 22 Hun, 208; *Cary* v. *Grunman*, 4 Hill, 625; *Hoffman* v. *Conner*, 76 N. Y. 121.) The exclusion of an answer to the question of defendants' counsel, "Are you willing to sell the property for $175,000?" was proper. The

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plaintiff had answered it. An answer could not have any bearing on the determination of the issue, and the judge exercised his discretion fairly in the cross-examination which he permitted. (*People* v. *Oyer and Terminer*, 83 N. Y. 460; Thompson on Trials, §§ 415, 518.) The evidence of Saltzseider as to the rent which he paid for an old building which he had only occupied for nine months before the trial and only since the bringing of the action, was properly excluded. (*Peyser* v. *M. E. R. Co.*, 13 Daly, 127; *Gouge* v. *Roberts*, 53 N. Y. 619; *Blanchard* v. *N. J. S. Co.*, 59 id. 292; *Bradshaw* v. *R., W. & O. R. R. Co.*, 17 N. Y. S. R. 307; *P. & N. R. R. & C. Co.* v. *Bunnell*, 81 Penn. St. 414; *E. P. R. R. Co.* v. *Heiser*, 40 id. 53; *C. P. R. R. Co.* v. *Pearson*, 35 Cal. 247; *Stimson* v. *C., S. P. & M. R. Co.*, 27 Minn. 285; 1 Greenl. on Ev. § 448; Mills on Em. Domain, § 170; *Kiernan* v. *C., S. F. & C. R. Co.*, 14 N. E. Rep. 18; *N. Y. N. E. Bank* v. *M. E. R. Co.*, 21 J. & S. 511; *Washburn* v. *Milwaukee*, 59 Wis. 364; *Shattuck* v. *Stoneham*, 6 Allen, 115; *Ham* v. *Salen*, 100 Mass. 350.) The evidence as to sales concerned the fee value, and raises no question on appeal, being merely for the purpose of providing the alternative to the injunction. (*N. Y. N. E. Bank* v. *M. E. R. Co.*, 21 J. & S. 511; *Carter* v. *N. Y. E. R. R. Co.*, 25 id. 279.) Even if there be any error in the admission of testimony, that is no ground for reversing the judgment for an injunction, and it is no ground for reversing the award, by a court sitting in equity, for past damages, if the court can find sufficient evidence in the record to support that award, assuming answers favorable to the defendants to any question erroneously excluded. (*In re N. Y. C. & H. R. R. R. Co.*, 90 N. Y. 347; *Forrest* v. *Forrest*, 25 id. 501, 510; *Marsh* v. *Pierce*, 21 Wkly. Dig. 51; *Wright* v. *Dugan*, 15 Abb. [N. C.] 107; *McCall* v. *Moschowitz*, 10 Civ. Pro. Rep. 107, 108; Code Civ. Pro. § 1003; *Machen* v. *L. Ins. Co.*, 2 Civ. Pro. Rep. 28; *McGean* v. *M. R. Co.*, 117 N. Y. 219; *Doe* v. *Tyler*, 6 Bing. 561; *Shapcott* v. *Chappell*, L. R. [12 Q. B. Div.] 58.) The plaintiff was entitled to recover damages for the whole

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period of six years before the bringing of the action. (*Kane* v. *N. Y. E. R. R. Co.*, 26 N. E. Rep. 278; 34 N. Y. S. R. 876; *Hamilton* v. *M. R. Co.*, 25 J. & S. 491; *Mortimer* v. *M. R. Co.*, Id. 509; 1 Sedg. on Dam. 34; *Lambert* v. *Hoke*, 14 Johns. 383; 1 Chitty on Pleadings, 157; *Sumner* v. *Tileston*, 7 Pick. 198; *Harr* v. *Jackson*, 11 Mass. 519; *Jesser* v. *Gifford*, 4 Burr. 2141; *Arnold* v. *N. Y. C. R. R. Co.*, 55 N. Y. 662; *Glover* v. *M. R. Co.*, 19 J. & S. 1, 3; *Broiestadt* v. *S. S. & R. R. Co.*, 55 N. Y. 220; *Corning* v. *T. I. & N. Foundry*, 40 id. 191; *Campbell* v. *Seaman*, 63 id. 568; *Shepard* v. *M. E. R. Co.*, 117 id. 442; *Mitchell* v. *M. E. R. Co.*, 56 Hun, 543; *Doyler* v. *Lord*, 64 N. Y. 433; *Jawes* v. *Plant*, 4 Ad. & El. 749; *Bertie* v. *Beaumont*, 16 East, 33, 36; *Cushing* v. *Kenfield*, 87 Mass. 307; *Wheelock* v. *Noonan*, 108 N. Y. 578; *Rochester* v. *N. Y., L. E. & W. R. Co.*, 110 id. 128.) Benefits cannot be allowed for. (*Francis* v. *Schoellkopf*, 53 N. Y. 152; *Eagle* v. *Clearing*, L. R. [2 C. P.] 638; *Sanderson* v. *Pennsylvania*, 102 Penn. St. 370; *Marcy* v. *Fries*, 18 Kans. 353; 1 Sedg. on Dam. 56; *N. Y. N. E. Bank* v. *M. E. R. Co.*, 108 N. Y. 660; Laws of 1850, chap. 140, § 16; Laws of 1875, chap. 656, § 20.) The judgment of injunction must be affirmed, even if there be any error as to the award of past damages. (*Tallman* v. *M. E. R. Co.*, 121 N. Y. 119; Code Civ. Pro. § 1317; *Corning* v. *T. I. & N. Co.*, 40 N. Y. 221; Bump on Patents, 629; *Smith* v. *Rochester*, 38 Hun, 612; *Webb* v. *Portland*, 3 Sumn. 189; *Meyer* v. *Phillips*, 97 N. Y. 490, 491.) It was proper to ask a qualified expert witness: "What in your judgment would the property be worth without the elevated road?" (*Joy* v. *Hopkins*, 5 Den. 84; *Clark* v. *Baird*, 9 N. Y. 183; *Rochester* v. *Budlong*, 10 How. Pr. 289; *Hine* v. *N. Y. E. R. R. Co.*, 36 Hun, 293; *In re City of Rochester*, 40 id. 588; *Vanderburg* v. *Boston*, 21 Wkly. Dig. 474; *Reed* v. *R., W. & O. R. R. Co.*, 48 Hun, 231; *Teerpening* v. *Corn Exchange*, 43 N. Y. 282; *N. Y. N. E. Bank* v. *M. E. R. Co.*, 21 J. & S. 511; 108 N. Y. 660; Lewis on Em. Domain, 436; *Guiterman* v. *Liverpool*, 83 N. Y. 365; *Dunscomb* v. *Hollister*, 49 Hun, 352.)

Opinion of the Court, per EARL, J.

EARL, J. This action was commenced by the plaintiff, an abutting owner upon defendants' railway, to recover damages to her abutting premises by the maintenance and operation of the railway and to restrain the defendants from maintaining and operating the same. Upon the trial, she gave evidence tending to show the damage to both the rental and fee value of her premises, and the court found the rental damage to be twelve thousand dollars, and the fee damage to be sixteen thousand dollars, and ordered judgment in her favor for the twelve thousand dollars, and an injunction restraining the defendants from operating their railroad in front of her premises, the injunction, however, not to be issued for a period of sixty days after the entry of judgment, to enable the defendants to acquire her easements in the street by condemnation proceedings, or by the payment of the sum of sixteen thousand dollars. The judgment thus rendered having been affirmed at the General Term, the defendants have appealed to this court.

According to our decision in the case of *Galway* v. *These same defendants*,* the plaintiff's cause of action was not barred by the Statute of Limitations or by *laches*, and we need say nothing more in reference to these objections to her right to recover.

There was a serious controversy upon the trial as to the amount of plaintiff's damages, and the defendants claim that improper evidence was received upon that subject. A real estate expert was produced as a witness on her behalf and asked this question: "What, in your judgment, would the property be worth without the elevated railroad?" This was objected to by the defendants, and each of them, as hypothetical, speculative and incompetent; and the court overruled the objection, and the witness answered: "Think they would be worth $200,000 to $225,000." He had previously testified that the present value of the premises was $150,000 to $175,000. We have just decided in the case of *Roberts* v. *Elevated Railroad Company*, that a similar question was

*Ante, page 132.

npetent, and that it was erroneous to allow it to be ered, and we need say no more about it now. For this the judgment must be reversed.

it there were other erroneous rulings upon questions of ence. The plaintiff was permitted, against the objection ie defendants, to prove the effect of the operation of the upon the premises upon the corner opposite to that upon h her premises were situated. It is probably true that exposure of those premises to damage from the road was ter than that to the plaintiff's premises. But we think it competent to prove the effect upon those premises so that trial judge could be informed generally of the effects pro-ed by the operation of the road. But the defendants were nibited, upon her objections, from giving similar evidence. premises, it must be borne in mind, were at the south-east ner of Fifty-third street and Sixth avenue. Jackson, a ness for the defendants, who had been conducting a grocery iness for six years at the corner of Fifty-first street and the nue, and still earlier at the corner of Twenty-fourth street, asked this question: "Will you state whether the elevated road has caused any material or substantial interference h light, air and access in any of the buildings which you e occupied on Sixth avenue?" Plaintiff's counsel objected his as "incompetent and immaterial, and because the witness never occupied the Doyle buildings." Archer, another ness for the defendants, who, for seven years, had occupied ore on the south-east corner of Fifty-seventh street and th avenue, was asked this question: "State whether the lroad causes any interference with the light, air and access the buildings which you occupy on Sixth avenue?" This s objected to as incompetent and immaterial. He was also ed this question: "State whether the elevated railroad, ording to your observation, affects in any way the light, air access of any of those buildings on the east side of Sixth enue?" This was objected to as too broad. The counsel the defendants then said that he would qualify the ques-n "by putting it between Fifty-first street and Fifty-seventh

street," and plaintiff's counsel again objected to the question on the "ground that the question should refer to the Doyle property." Salzseider, who owned and resided in a building on the south-west corner of Fifty-fourth street and Sixth avenue, was asked this question: "State whether the passage of the trains caused any flickering of light in your rooms?" This was objected to as immaterial and incompetent. He was also asked this question: "Did the existence of the elevated railroad cause any interference with the access to your premises?" This was objected to on the same grounds. Prigge, also a witness for the defendants, who had for many years occupied a building on the north-west corner of Fifty-ninth street and Sixth avenue for the grocery business and as a residence, was asked this question: "Has the elevated railroad affected the light, air or access of the premises which you occupied in any material or appreciable degree?" To this there was a general objection specifying no grounds. These objections to these questions were all sustained. These witnesses were asked to testify to facts within their knowledge. Sixth avenue is a broad avenue of uniform width, and while the premises occupied by the witnesses were not in their situation exactly like the plaintiff's, they were similarly situated, and the questions would have elicited facts proper for the guidance and information of the court. It was proper for the defendants to show the general effects of the road upon abutting premises. Much of the damage which the plaintiff claimed was caused to her premises, if it was actually caused to the extent claimed by her, must have been common along the avenue in the vicinity of her premises, and proof of the effects upon other premises not too distant from hers should have been received. The court may, undoubtedly, in such a case, in the exercise of its discretion, limit the number of witnesses to be called, and may confine the examination of the witnesses to premises in the vicinity, giving a reasonable range. But it cannot properly confine the examination to the particular premises in question and exclude all proof offered as to the general effects upon other premises.

he defendants also offered evidence as to the effects of the ated road upon the business and traffic in Sixth avenue, ch was improperly excluded. The defendants put the fol- ng questions to several witnesses who had done business several years upon Sixth avenue in the vicinity of the ıtiff's premises, and who appeared to be familiar with the ue and its business, and competent to speak in reference eto: "What have you observed in respect to the effect of levated railroad upon property in this avenue?" "What been the effect of the elevated railroad upon the business xth avenue?" "What has been the effect of the elevated oad upon Sixth avenue as a business street?" "What een the course of business in that vicinity since the ele- l railroad was built in that vicinity?" "State whether, the elevated railroad has been built in that street, busi- has increased over what it was before the elevated?" at is the volume of business in Sixth avenue in that ty since the elevated railroad as compared with what it efore?" "Has there been a change in Sixth avenue in d to the amount and character of business done there the elevated railroad from what there was before the " These questions were all objected to by plaintiff's el as incompetent and immaterial, and the court sustained jections. The plaintiff's premises consisted of five four- flat houses, with stores under them occupied for business ses. It was certainly competent for the defendants to that the premises, so far as they were occupied for ss purposes, were not damaged, but were actually bene- y the existence of the defendants' road. These questions not so much for the opinions of the witnesses, as for cts open to their observation. In answering such ques- the witnesses should be confined mainly to giving ed facts, and they should not be permitted to give mere tive opinions. Similar evidence was held competent in e of *Drucker* v. *Manhattan Railway Co.* (106 N. Y. In that case the plaintiff, as a witness, was asked this n: "What effect, if any, has it (the railway) had upon

the business of that store?" The defendants' counsel objected to "his stating the effect on the business; the inquiry should be as to the effect on values. It is irrelevant, immaterial and incompetent." The objection was overruled, and witness answered: "Customers don't come there any more as they used to on account of the smoke, dirt, noise and cinders what is there; and it is very dark in the stores; we can't show the goods, and before we could stand at the counter and show them, and now there is no light." He was also asked this question: "What was the condition of the property you owned and rented there, was business good before that?" He answered: "Certainly." He was then asked this question: "How is it now?" This was objected to by defendants' counsel as immaterial, incompetent and irrelevant; the objection was overruled, and he answered: "Nothing to what it has been." He was then asked this question: "Is there as much traffic on the street now as before the construction of the road?" This was objected to on the same grounds; the objection was overruled, and he answered: "No, sir." The plaintiff's wife was asked this question: "Was business ever before the construction of the road as bad as it was at the time of the commencement of this action, in December, 1882?" Objections on the same grounds were overruled, and she answered: "It was not, and from what I have heard of others they say the same." Another witness for the plaintiff was permitted to testify, against similar objections on behalf of the defendants, as follows: "I know business was changed materially in consequence of the elevated road. Falling off in business became first apparent when the road was first completed, when they first began talking about putting the road through that street." It was of this evidence that Judge FINCH in his opinion in that case pertinently said: "Objection was made to the proof that since the building of the elevated road the trade and business of Division street has fallen off and the current of custom had largely lessened in volume and changed in character, and upon the ground that injury to the plaintiff and not to his neighbors was alone

al. But to measure and appreciate that individual loss, ture and extent of the general injury was necessarily to sidered. To ascertain how much the plaintiff was injured impairment of his easement required a survey of the l facts and a deduction from them of the particular and damage to be estimated."

his class of cases it is quite improper to permit expert ses to speculate as to the facts and then base a speculative n upon the facts. Such witnesses may give opinions as present or past value of property based upon facts they have observed, and they may give opinions on other s which are the proper subject of expert evidence based facts known to them or proved by competent evidence; us there will be a sufficient range for expert evidence. r as possible facts should be placed before the triers of nd their unbiased, disinterested inferences from the and opinions upon the facts, will serve the ends of justice better than the prejudiced opinions of hired experts. the errors mentioned the judgment should be reversed new trial granted, cost to abide the event.

concur, PECKHAM and GRAY, JJ., in result.

lgment reversed.

A. C. GRAY, Appellant, *v.* THE MANHATTAN RAILWAY COMPANY et al., Respondents.

128	499
132	486
128	499
133	664
133	677
128	499
138	552
128	499
148	855
128	499
149	173
128	499
d 159	883

ction by an abutting owner to restrain defendant from the mainte- e and operation of its elevated road in a street, a witness was asked permitted to answer. under objection and exception, as to what, in pinion, was the best use to which the plaintiff's property "could been put if it had not been for the elevated railroad and this inter- ce." *Held*, error.

dgment of the trial court granted an injunction unless defendants a sum fixed as the damages to the fee, upon receiving a conveyance plaintiff of the easements taken, in which case it was denied. It claimed here that the whole judgment should not have been reversed use of error in admitting improper evidence bearing upon the ques- as to the damages to the fee, but that the portion which awarded

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the injunction should be permitted to stand. *Held*, untenable; that the question as to the granting of the injunction was dependent upon the amount of damages, as unless the court had found them to be substantial, it could, in the exercise of its discretion, have withheld the injunction and left plaintiff to his remedy at law; also that it was discretionary with the court either to reverse in whole or in part.

An equity court is not bound to issue an injunction when it will produce great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right.

It is generally in the discretion of the court, when it finds error in part of a judgment requiring a reversal of that part, to reverse the whole judgment, and such discretion will not, except under peculiar circumstances, be interfered with upon appeal to this court.

(Argued June 3, 1891; decided October 20, 1891.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made January 5, 1891, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial.

The plaintiff was the owner of four vacant lots of land at the corner of Ninth avenue and Seventy-seventh street, in the city of New York. He brought this action as an abutting owner, praying for an injunction restraining the defendants from maintaining and operating their road in front of his lots, and for damages caused to his lots, and for other relief. The trial court ordered judgment in his favor for the injunction prayed for, provided, however, that the injunction should not issue until after sixty days from the entry of judgment, to enable the defendants to acquire his easements in the street by condemnation proceedings, or by the payment of the sum of $8,000, the amount found to be the full damages to the lots. Provided, also, that the injunction should be wholly inoperative unless plaintiff tendered a conveyance and release of his easements in the street appropriated by defendant, and it refused to accept the conveyance and pay the amount of damages so fixed. The court found no damage to the rental value of the lots prior to the judgment, and found that "said premises would not be worth as much as they

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re, had the said railway and stations not been built," and found that the fee of plaintiff's real estate is diminished ıe by the maintenance and operation of the road by the f $8,000, and to this finding the defendants excepted. eneral Term reversed the judgment and ordered a new ıs appears from the opinion there pronounced, without ering other alleged errors, on the ground that the find- f the court showed that the plaintiff's real estate was not ;ed by the defendants, and that the trial judge erred as damages.

k Cowen, *George P. Smith* and *Edward C. Perkins* for ant. The maintenance and operation of the elevated road nt of plaintiff's premises were not justified as to him by ut constituted an unlawful interference with his right of rty, and he was entitled to an injunction, whether he suf- pecuniary loss or not; and the appellate court, therefore, in absolutely reversing the judgment. (*Story* v. *M. E.* ., 90 N. Y. 122; *Lahr* v. *M. E. R. Co.*, 104 id. 268; *ker* v. *M. E. R. Co.*, 106 id. 158; *Smith* v. *City of Roch-* 104 id. 674; *Corning* v. *T. I. & N. Foundry*, 40 id. 191; v. *P. M. Co.*, 3 Sumn. 189; *W. & B. C. Co.* v. *Swin-* L. R. [9 Ch. App.] 451; *Lyon* v. *McLaughlin*, 32 Vt. *Ward* v. *Warren*, 82 N. Y. 455; *Nicholls* v. *Wentworth*, d. 455; *Lund* v. *City of New Bedford*, 121 Mass. 268, 290; *Plumleigh* v. *Dawson*, 6 Ill. 544, 551, 552; *chard* v. *Baker*, 8 Me. 253; *Chapman* v. *Thames Co.*, nn. 269; *Crooker* v. *Bragg*, 10 Wend. 260, 266; *Ware len*, 140 Mass. 513; *Lawson* v. *Menasha*, 59 Wis. 393.) opportunity offered to the defendants to avoid the injunc- y payment of a certain sum, was a mere act of grace on art of the court, of which defendants were not bound to themselves. An error in computing that sum, therefore, ıo ground for appeal on their part. (*Henderson* v. *N. Y.* . *R. Co.*, 78 N. Y. 423, 429, 430; 17 Hun, 344, 352; *N.* V. *E. Bank* v. *M. R. R. Co.*, 21 J. & S. 511, 513; 108 . 660; *Lawrence* v. *M. R. R. Co.*, 35 N. Y. S. R. 39;

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Welsh v. *R. R. Co.*, 8 N. Y. Supp. 492; *Carter* v. *R. R. Co.*, 25 J. & S. 279, 281; *Eno* v. *M. R. R. Co.*, 24 id. 313, 318; *Smith* v. *Rathburn*, 75 N. Y. 122, 126, 127; *Carll* v. *Oakley*, 97 N. Y. 633, 635; *Genet* v. *Davenport*, 59 N. Y. 648; *Bartlett* v. *Stinton*, L. R. [1 C. P.] 483, 484; *Radway* v. *Graham*, 4 Abb. 468; *Murphy* v. *Spalding*, 46 N. Y. 559.) There was no error, however, in the determination of the Special Term as to the amount to be paid, and defendants were not entitled to any deduction for benefits. (*Roberts* v. *Comrs., etc.*, 24 Kan. 247; *Armstrong* v. *City of St. Louis*, 69 Mo. 309; *Francis* v. *Schoellkopf*, 53 N. Y. 152; *Eagle* v. *Clearing*, L. R. [2 C. P.] 638; *Sanderson* v. *Pennsylvania*, 102 Penn. St. 370; *Marcy* v. *Fries*, 18 Kan. 353; 1 Sedg. on Dam. 56; *N. V. R. R. Co.* v. *McClure*, 29 Ind. 536; Laws of 1850, chap. 140, § 16; Laws of 1885, chap. 606, § 21; *S. A. R. R. Co.* v. *Kerr*, 72 N. Y. 333.) Evidence was properly received by the trial court, to show the difference in the value of the plaintiff's lots as they are, and their value as they would have been if the defendants' road had not been built, for the purpose of fixing the compensation to the plaintiff for the easements taken by the defendants. (*Jay* v. *Hopkins*, 5 Den. 84; *Clark* v. *Baird*, 9 N. Y. 183; *Robertson* v. *Knapp*, 35 id. 91; *Van Deusen* v. *Young*, 29 id. 36; *Argotsinger* v. *Vines*, 82 id. 308; *R. & S. R. R. Co.* v. *Budlong*, 6 How. Pr. 467; 10 id. 289; *N. Y., L. E. & W. R. R. Co.* v. *Harnett*, 27 Hun, 151; *In re N. & M. R. R. Co.*, 47 id. 489; *People* v. *McCarthy*, 102 N. Y. 639; *Tallman* v. *M. E. R. Co.*, 121 id. 119.) The admission of evidence to show that this land was specially adapted to a valuable use, and that the railroad had destroyed such use, was proper. (*Boom Co.* v. *Patterson*, 98 U. S. 403; *Chicago & E. R R. Co.* v. *Jacobs*, 110 Ill. 414; *C. R. Co.* v. *Moore*, 124 id. 329; *Galway* v. *M. E. R. Co.*, 13 N. Y. Supp. 47.) Even if the court had erred in the rulings as to the measure of compensation for the easements taken, the error would not be regarded, for the exclusion of the evidence could not have altered the result. (*McGean Case*, 117 N. Y. 223; *Birch* v. *M. E. R. Co.*, 8 N. Y. Supp.

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5; *Rooswell* v. *N. Y. E. R. R. Co.*, Id. 547; *Werfelman* *M. R. Co.*, 11 id. 66; *Kenkle* v. *M. R. Co.*, 62 Hun, 8.)

Henry A. Foster for appellant. The alleged special benefit the plaintiff's land and building from the elevated railroad not be set off against the value of that part of the easements light, air and access belonging to the plaintiff which defend- ts have taken. (*N. Y. N. E. Bank* v. *M. E. R. Co.*, 21 J. & 512; 108 N. Y. 660; Laws of 1875, chap. 606, § 20; Laws 1850, chap. 140, § 16; Laws of 1872, chap. 885, § 3; Code v. Pro. §§ 3370, 3383; Laws of 1890, chap. 95; *Story* v. *E. R. Co.*, 90 N. Y. 179; *Lahr* v. *M. E. R. Co.*, 104 id.); 117 id. 448; *S. A. R. R. Co.* v. *Kerr*, 72 id. 333; *Rock-l* v. *Nelson*, 24 Ind. 424; *Ewing* v. *Ewing*, Id. 470; *Van inkle* v. *Constantine*, 10 N. Y. 422; *McMahon* v. *City of ncinnati*, 5 Ind. 413; *Newcastle* v. *Brambach*, Id. 543; *ansville* v. *Fitzpatrick*, 10 id. 120; *W. W. R. R. Co.* v. *Clure*, 29 id. 536; *Frederick* v. *Shane*, 32 Iowa, 254; *Bland Hixenburgh*, 39 id. 532; *Britton* v. *D., M. O. & S. R. Co.*, id. 540; *A. R. R. Co.* v. *Burkett*, 42 Ala. 84, 89, 90; *ipley* v. *R. R. Co.*, 34 Md. 336; *Tremont* v. *Whalen*, 11 b. 585; *Wagner* v. *Gage County*, 3 id. 237; *Paducah* v. *vall*, 12 Heisk. 1; *Woodfolk* v. *N. R. R. Co.*, 2 Swan, ; *E. T. R. R. Co.* v. *Love*, 3 Head, 64; *Memphis* v. *lton*, 9 Heisk. 508; *M. R. R. Co.* v. *McDonald*, 12 id. 54; *tchell* v. *Thornton*, 21 Gratt. 164; *James River* v. *Turner*, eigh, 313; *R. R. Co.* v. *Tyree*, 7 W. Va. 693; *R. R. Co.* *Foreman*, 24 id. 662; *Robbins* v. *Harrison*, 6 Wis. 636; *ilson* v. *City of Chicago*, 58 id. 516; *Washburn* v. *City* *Milwaukee*, 59 id. 364; *Brown* v. *Beatty*, 34 Miss. 228; *nrice* v. *Wallis*, 37 id. 172; *New Orleans* v. *Moye*, 39 id. ; *Commissioners* v. *Harkleroads*, 62 id. 807; *Whitehead* *Arkansas*, 28 Ark. 464.) As the plaintiff was entitled to absolute injunction against the defendants, the provision t on the payment of the sum fixed as the value of the ntiff's easements, the injunction should be avoided, was a

grace or privilege to the defendants, and the defendants are not entitled to complain that the terms on which such a favor is given to them are higher than they think such terms should have been. (90 N. Y. 123, 179; 104 id. 269, 288; 123 id. 1; 34 N. Y. S. R. 876; 117 N. Y. 448; *Smith* v. *City of Rochester*, 38 Hun, 612, 615; 104 N. Y. 674; *Corning* v. *T. I. & N. Factory*, 40 id. 191; *Lund* v. *City of New Bedford*, 121 Mass. 286; *Plumleigh* v. *Dawson*, 6 Ill. 544, 551, 552; *Blanchard* v. *Baker*, 8 Me. 253; *Chapman* v. *T. M. Co.*, 13 Conn. 269; *Crooker* v. *Bragg*, 10 Wend. 260, 266; *Wilts & B. C., etc., Co.* v. *Swindon*, L. R. [9 Ch. App.] 457; 7 id. 697; *Ware* v. *Allen*, 140 Mass. 513; *Webb* v. *P. M. Co.*, 3 Sumn. 189; *Hammond* v. *Zehner*, 21 N. Y. 118; *Nicholls* v. *Wentworth*, 100 id. 455; *Eckerson* v. *Crippen*, 110 id. 585; *Barnes* v. *Seligman*, 55 Hun, 339; *Bruce* v. *Welsh*, 52 id. 524; *Henderson* v. *N. Y. C. & H. R. R. R. Co.*, 78 N. Y. 423; *N. Y. N. E. Bank* v. *M. E. R. Co.*, 108 id. 669; *Smith* v. *Rathbun*, 75 id. 122, 126, 127; *Carll* v. *Oakley*, 97 id. 633, 634; *Genet* v. *Davenport*, 59 id. 648; *Bartlett* v. *Stinton*, L. R. [1 C. P.] 483; *Pearce* v. *Chaplin*, L. R. [9 Q. B.] 802.)

John F. Dillon, *Julien T. Davies* and *Samuel Blythe Rogers* for respondents. The reversal at General Term was properly directed, because of the finding of the trial court that these premises are worth more than they would have been had the railway and stations not been built. (*Bonnell* v. *Griswold*, 89 N. Y. 122; *Schwinger* v. *Raymond*, 83 id. 192; *Conselyea* v. *Blanchard*, 103 id. 222, 231; *Redfield* v. *Redfield*, 110 id. 671; *Genet* v. *D. & H. C. Co.*, 122 id. 505; *Hart* v. *MacLaury*, 121 id. 636; *Elmhirst* v. *Spencer*, 2 M. & G. 45, 50; *Kensit* v. *G. E. R. Co.*, L. R. [23 Ch. Div.] 566, 573; *Jeffers* v. *Jeffers*, 107 N. Y. 653; *Morgan* v. *City of Binghamton*, 102 id. 500; *T., etc., R. Co.* v. *H. T., etc., R. Co.*, 86 id. 106, 123, 126; *People* v. *M. T. Co.*, 31 Hun, 596; *Drake* v. *H. R. R. Co.*, 7 Barb. 508; *Jerome* v. *Ross*, 7 Johns. Ch. 315; *Livingston* v. *Livingston*, 6 id. 497; *Newman* v. *M. E. R. Co.*, 118 N. Y. 618; Laws of 1882, chap. 410, § 970; Laws of 1854,

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p. 384, §§ 3, 6–9; *Genet* v. *City of Brooklyn*, 99 N. Y. 296; *xford* v. *Knight*, 15 Barb. 627; *Newby* v. *P. Co.*, 25 Mo. 258; *lck* v. *Reinheimer*, 105 N. Y. 470; *J. R. Co.* v. *Turner*, eigh. 313; *Betts* v. *City of Williamsburgh*, 15 Barb. 256; *& P. R. Co.* v. *Francis*, 70 Ill. 238; *Young* v. *Harrison*, Ga. 30; Lewis on Em. Domain, § 470; 1 Redf. on Railways h ed.], 272; *In re B. E. R. Co.*, 55 Hun, 165; *Henderson N. Y. C. & H. R. R. Co.*, 78 N. Y. 423; *In re W. S. R. Co.*, 29 Hun, 609; *T. & B. R. R. Co.* v. *Lee*, 13 Barb.); *U., etc., R. Co.* v. *Lee*, 56 id. 456; *B. R. R. Co.* v. *rnard*, 9 Hun, 104, 105, 106; *In re N. Y. C. R. R. Co.* v. *dge*, 15 id. 63; *In re N. Y., L. E. & W. R. Co.* v. *Arnot*, id. 151, 155; *In re N. Y., L. E. & W. R. Co.* v. *Miller*, id. 542; *Dupins* v. *C. & N. W. R. Co.*, 115 Ill. 97; *Fred-k* v. *Shane*, 32 Ia. 254; *H. & N. R. Co.* v. *Dickerson*, 17 Mon. 173; *Whitman* v. *B. & M. R. R. Co.*, 7 Allen, 313; *mphis* v. *Bolton*, 9 Heisk. 508.) The reversal at General m was properly directed because of the express refusal of trial judge to take into consideration any special or peculiar efits. (*Cross* v. *Plymouth*, 125 Mass. 557; *Hilbourne* v. *folk*, 120 id. 393; *Donovan* v. *Springfield*, 125 id. 373; *ucker* v. *M. R. Co.*, 106 N. Y. 157; *McGean* v. *M. R. Co.*, id. 219; *Avery* v. *N. Y. C. & H. R. R. R. Co.*, 121 id. *P. & L. E. R. Co.* v. *Robinson*, 95 Penn. St. 426; *Hayes* ., *etc., R. Co.*, 54 Ill. 373, 375; *Nicholson* v. *N. Y. & N. R. Co.*, 22 Conn. 74, 79; *Cleveland & P. R. Co.* v. *Ball*, hio St. 568, 578; *Payne* v. *Woods*, 108 Mass. 160; *Trinity lege* v. *City of Hartford*, 32 Conn. 452; *Van Slyke* v. *att*, 46 N. Y. 259; *Leffler* v. *Field*, 33 How. Pr. 385.) e reversal in this case was properly directed, for the error the trial judge in admitting the opinions of witnesses, as to at this property would be worth if the railway were not re. (*McGean* v. *M. R. Co.*, 117 N. Y. 219; *Avery* v. *N. C. & H. R. R. R. Co.*, 121 id. 31; *Starbird* v. *Barrows*, id. 200; *Coleman* v. *People*, 58 id. 555; *People* v. *Fer-ndez*, 35 id. 59; *Foote* v. *Beecher*, 78 id. 155, 157; *Williams Fitch*, 18 id. 546; *Carroll* v. *Diemel*, 95 id. 252, 256; *Hol-*

comb v. *Holcomb*, Id. 316, 329.) The reversal was properly directed, for the error of the trial judge in admitting evidence that the plaintiff's land, had the railway not been built, might have been used for fashionable private residences, whereas now it is only suitable for shops and flats. (*Greene* v. *N. Y. C. R. R. Co.*, 12 Abb. [N. C.] 124; *Filer* v. *N. Y. C. R. R. Co.*, 49 N. Y. 44; *Caldwell* v. *Murphy*, 1 Duer, 248; 11 N. Y. 416; *Fetter* v. *Beal*, 1 Ld. Raym. 339; *Brown* v. *Howard*, 4 Moore, 508; Angell on Lim. [6th ed.] 123; *Howell* v. *Young*, 5 B. & C. 259; *Battley* v. *Faulkner*, 3 B. & Ald. 288; *Northrop* v. *Hill*, 61 Bark. 136; *Argall* v. *Bryant*, 1 Sandf. 98; *McKerras* v. *Gardner*, 3 Johns. 137; *Bank of Utica* v. *Childs*, 6 N. Y. 238; *Griffin* v. *Colver*, 16 id. 489; *Ehrgott* v. *Mayor, etc.*, 96 id. 264; 1 Sedg. on Dam. 38, 90, 144; *Tallman* v. *M. E. R. Co.*, 121 N. Y. 119; *S. A. R. R. Co.* v. *M. E. R. Co.*, 56 Hun, 182; *Dorland* v. *R. R. Co.*, 46 Penn. St. 520.) The enactment of the condemnation law of 1890, so far from militating against the General Term decision, is an additional and most cogent argument in its favor. (Endlich on Inter. of Statute, § 368.) Plaintiff was not entitled to an injunction, except to prevent actual appreciable injury. (*MacLaury* v. *Hart*, 121 N. Y. 636; *Brush* v. *M. R. Co.*, 26 Abb. [N. C.] 73; *Genet* v. *D. & H. C. Co.*, 34 N. Y. S. R. 247; *Thomas* v. *M. P. Union*, 121 N. Y. 45; *Jeffers* v. *Jeffers*, 107 id. 650; *Campbell* v. *Seaman*, 63 id. 568; *Bigelow* v. *H. B. Co.*, 14 Conn. 565; *Eastman* v. *A. M. Co.*, 47 N. H. 78; *Kensit* v. *G. E. R. Co.*, L. R. [23 Ch. Div.] 566; *City of New York* v. *Mapes*, 6 Johns. Ch. 46; *Jerome* v. *Ross*, 7 id. 315.) But the judgment in this case is not one of injunction merely. Decrees or judgments like the one in this case have been generally by the lower courts given the effect of adjudications upon the question of the value of the easements taken by the railway company. (*In re M. E. R. Co.*, 27 N. Y. S. R. 576; *Henderson* v. *N. Y. C. & H. R. R. R. Co.*, 78 id. 430; *Doty* v. *Brown*, 4 N. Y. 71, 75; *Smith* v. *Smith*, 79 id. 334; Stephen on Evidence, art. 11n; *S. A. R. R. Co.* v. *M. E. R. Co.*, 56 Hun, 182.) Plaintiff's right is a right to use the equit-

ble process of the court to compel the making of compensa-
on, and not a right to recover specific real property, or the
ght to an injunction, irrespective of actual damage. (*Pond*
M. E. R. Co., 112 N. Y. 189; *N. E. Bank* v. *M. E. R.*
o., 108 id. 418; *Tallman* v. *M. E. R. Co.*, 121 id. 119; *N.*
. E. R. Co. v. *F. N. Bank*, 135 U. S. 432; *Henderson* v.
. Y. C. & H. R. R. R. Co., 78 N. Y. 424; *Uline* v. *N.*
. C. & H. R. R. R. Co., 101 id. 98; *Taylor* v. *M. E. R.*
o., 18 J. & S. 311; *People* v. *A., etc., R. Co.*, 24 N. Y. 261;
owers v. *M. R. Co.*, 120 id. 128.) In the present case the
cts are such that to grant an absolute injunction would be
equitable and unjust to the defendant and to the public.
Story's Eq. Juris. § 28; Kerr on Inj. 43; Pom. on Spec.
erf. § 474; *Russell* v. *Farley*, 105 U. S. 433.) If the order
the General Term is reversed, the Special Term judgment
ould be modified by the insertion of equitable terms which
e exigencies of this case require. (*Story* v. *M. E. R. Co.*,
N. Y. 179.)

EARL, J. The main question argued before us and con-
lered at the General Term is whether the plaintiff could
intain his judgment in the face of a finding that his "prem-
s would not be worth as much as they now are had the
lway and stations not been built." This is a very important
estion, and its determination may not only affect this case,
t may others pending or to be commenced. We do not
em it important or proper now to determine it, as there are
ier grounds for the affirmance of the order appealed from.
at question may remain undetermined in this court until it
presented for consideration in some case where its solution
equired.

We may look into the record and affirm the order if any
or is found there to the prejudice of the defendants.

The question of fee damages was closely contested upon the
l. The principal litigation between the parties related to
t, and the defendants had the right to have it determined
on competent evidence. Martine, an expert witness called

by the plaintiff, was asked this question: "What would be the value of the four lots at present if there were no interference with the light, air and access which you have described?" The defendants sufficiently objected to this, the court overruled the objection, and the witness answered: "Worth $112,000." Curtis, another expert witness, was asked this question: "Will you state what, in your opinion, would the value of the property be were it not for the existence of this interference with light, air and access by the elevated railroad and its structures and its cars?" Defendants' objection being overruled, the witness answered: "$110,000." Henriques, also an expert witness for the plaintiff, was asked a similar question, and, defendants' objections being overruled, he answered: "In the neighborhood of $112,000 to $115,000." We have just decided in *Roberts* v. *Elevated Railroad** and *Doyle* v. *The Same*† that such questions were incompetent, and that it is erroneous to permit them to be answered. The reasons for our decision are found in the opinion of Judge PECKHAM in the case first cited, and we need add nothing thereto.

The witness Henriques was also asked this question: "What, in your opinion, is the best use to which this property (the four lots) could have been put if it had not been for the elevated railroad and this interference?" This was objected to on behalf of the defendants "as not within the issue, as hypothetical and conjectural, and as not bearing upon the value of the easements in question, nor the true measure of damages, and as calling for the whole of the damage and not that resulting merely from a violation of the plaintiff's easement, and as incompetent, irrelevant and immaterial." The court overruled the objections, and the witness answered: "First class dwellings." He was then asked: "What is its best available use now?" This was objected to on the same grounds, and the witness was permitted to answer: "Stores and flat houses." The first of these two questions was clearly incompetent for the same reasons which condemn the questions first above referred to. What would have been the state of things at and

Ante, page 455. † *Ante*, page 488.

he vicinity of plaintiff's lots if the elevated road had not
n constructed was mere matter of speculation and con-
ure. No opinion in reference thereto could be based upon
erved or proved facts. The conditions upon which the
ness was asked to base his opinion never existed, and could
exist. Nor was it competent to prove by the opinions of
nesses the "best use" to which the lots could have been or
ld be put. The facts bearing upon the matter should be
ved, and the inferences from them should be drawn by the
rs of fact.

t is claimed, however, that the General Term ought not to
e reversed the whole judgment, and that it should have
mitted that portion of the judgment to stand which awarded
injunction. The injunction was not absolutely awarded;
it was awarded substantially upon the condition that if the
endants would pay the plaintiff the damage done to his lots
the taking of his easements, which was found to be eight
usand dollars, it should not issue. The amount of damage
thus quite material. Unless the court had found it to be
stantial, it could, in the exercise of its discretion, have
hheld the injunction and left the plaintiff to his remedy at
. An equity court is not bound to issue an injunction
en it will produce great public or private mischief merely
the purpose of protecting a technical or unsubstantial
ht. (*McHenry* v. *Jewett*, 90 N. Y. 58; *Health Depart-
nt* v. *Purdon*, 99 id. 237; *Jeffers* v. *Jeffers*, 107 id. 650;
net v. *D. & H. C. Co.*, 122 id. 505; *Thomas* v. *M. Mutual
otective Union*, 121 id. 45; *MacLaury* v. *Hart*, Id. 636.)
e injunction is so dependent upon the damages that the
neral Term could not with propriety reverse the judgment
o damages and permit it to stand as to the injunction. But
n if it could have reversed the judgment in part, it is at
st generally in the discretion of the court when it finds
or in part of a judgment requiring a reversal of such part,
reverse the whole judgment, and that discretion will not,
tainly except under peculiar circumstances which do not
st here, be interfered with upon appeal to this court. For

these views, the case of *Roberts* v. *Elevated Railroad* is also an authority.

For the errors mentioned, the order appealed from should be affirmed and judgment absolute ordered for the defendants, with costs.

All concur, except GRAY, J., not sitting.

Order affirmed and judgment accordingly.

128 510
133 333

128 510
160 246

THE SUBURBAN RAPID TRANSIT COMPANY, Appellant, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK et al., Respondents.

Although it may be within the power of the legislature to deprive a corporation of a franchise granted to it by its charter, if some public necessity demands it, the power will not be deemed to have been exerted, in the absence of some unequivocal expression of legislative intent.

That construction of a statute should be avoided which will injuriously affect existing rights, and one given which will harmonize its objects with the preservation and enjoyment of all such rights.

A railroad corporation duly organized under and in pursuance of the "Rapid Transit Act" (Chap. 606, Laws of 1875), acquires by the act of incorporation, and upon obtaining the necessary consents of the public authorities and the property owners, an indefeasible right to construct its road upon the route or routes designated in its articles of incorporation; the lands necessary for the purpose are by the sovereign power appropriated to that exclusive use, and a lien is impressed upon them in favor of the corporation, which ripens into title through purchase or condemnation proceedings; the subsequent condemnation of the lands in the course of the railroad construction is merely incidental, in order to compensate property holders.

The distinction between such a corporation and one organized under the General Railroad Act pointed out.

Prior to the passage of the act of 1884 (Chap. 522. Laws of 1884), providing for the laying out of new parks in the city of New York, plaintiff had been organized under the "Rapid Transit Act;" one of its routes, as located by the articles of association and to which the necessary consents of the public authorities and property holders had been obtained, ran through private grounds. These were included in one of the parks designated in said act; subsequent to its passage, plaintiff, by condemnation proceedings, acquired the right to the strip of land over which the

Statement of case.

ıte was located. The commissioners of estimate, appointed under the ; of 1884, made an award to plaintiff, as the value of the strip, which it ·used to receive. The city authorities, claiming to have acquired the ;, took possession of the strip and prevented plaintiff from proceeding th its work of construction thereon. In an action to determine the rights the parties, *held*, that plaintiff, by and upon its organization, became ssessed of the absolute and exclusive franchise to construct, operate and aintain its road over the strip in question, which operated to vest in it legal right to have said strip; that said franchise was not impaired by e fact that the work of actual construction had not been commenced the land condemned before the passage of the act of 1884, and plaintiff as not divested thereof by the proceedings under said act; that it was operative to take away or to authorize a deprivation or curtailment of ıch right; that it was not necessarily to be inferred from the language the act that it was the legislative intent to destroy the prior public use cluded in plaintiff's franchise, but rather that the two uses should stand ·gether; and that the appropriation for a public park was intended to ; subject to the exercise by the plaintiff of its franchise.

ırgued June 18, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Supreme urt in the first judicial department, entered upon an order de April 17, 1891, which affirmed a judgment in favor of :endants entered upon an order of Special Term sustaining lemurrer to the complaint.

The nature of the action and the facts, so far as material, stated in the opinion.

Burton N. Harrison for appellant. The General Term ıregarded the consents of public authorities and property lders, consenting to plaintiff's railways, and attributed no ;nificance to the proceedings of the rapid transit commis- ıners, in 1880, locating plaintiff's routes. Its order is erro- ous and should be reversed, with the judgment founded on (Laws of 1875, chap. 606; *R. H. & T. R. R. Co.* v. *N.* ., *L. E. & W. R. R. Co.*, 110 N. Y. 128; *In re U. E. R.* . *Co.*, 112 id. 74; *People* v. *O'Brien*, 11 id. 1; *S. W. Co.* v. *ity of Syracuse*, 116 id. 182; *In re R. W. Comrs.*, 66 id. 8.) A company incorporated under the Rapid Transit Act is no power to abandon or change any portion of any route

prescribed for it, but must complete the railway upon every portion of each of those routes, or it forfeits all its rights and franchises there or elsewhere. (Laws of 1875, chap. 606, § 7; *In re N. Y. C. Co.* v. *Mayor, etc.*, 104 N. Y. 1.) Provisions of the Rapid Transit Act, which show that the plaintiff's routes having been lawfully located, and the requisite consents having been given by the public authorities and the owners of abutting property, plaintiff is now entitled to enter upon every part of the lands through which such routes were so located, for the purpose of constructing and operating the railway prescribed by the commissioners. (Laws of 1875, chap. 606, §§ 4, 26; Laws of 1891, chap. 4.) The property the plaintiff had and has in plaintiff's franchise to construct and operate its railway on the route in question, was in 1884, and now still is, property which, under the Constitution, could not be taken from plaintiff, except upon due compensation. (*City of Detroit* v. *D. & H. P. R. Co.*, 43 Mich. 140.) This being a case where the defendants are attempting, under color of chapter 522, Laws 1884, to take from plaintiff lands which had already been devoted to a public use before that act was passed, and to divest plaintiff of the franchise there to construct and operate a railway, defendants must show the intent of the legislature in clear and express terms, or by necessary implication in the act they rely on. (*In re B. & A. R. R. Co.*, 53 N. Y. 577; *In re City of Buffalo*, 68 id. 167; 99 N. Y. 23.) The legislature has, by the act of 1888 (Chap. 421 of the Laws of that year), amending the New Parks Act, shown what the legislative intent was as to this plaintiff's railroad right of way in chapter 522, Laws of 1884. (*Gue* v. *Tide Water Canal Co.*, 24 How. [U. S.] 157; 2 Morawetz on Corp. §§ 924, 1125; *People* v. *O'Brien*, 111 N. Y. 1, 60; Laws of 1888, chap. 421, § 2; *In re R. W. Comrs.*, 66 N. Y. 422; *N. Y. & O. M. R. R. Co.* v. *Horn*, 57 id. 473.) The mention made at the end of section 1 of chapter 522, Laws of 1884, of the report of the commissioners under chapter 253, Laws of 1883, incorporates that report in the act and allows reference to it to ascertain the legislative intent. (*Furman* v. *Mayor, etc.*, 5

. 16; *People* v. *Dana*, 22 Cal. 11; *Municipality* v. *an*, 1 La. Ann. 111; *Blake* v. *Nat. Banks*, 23 Wall. .] 307, 321; *People ex rel.* v. *Schuyler*, 79 N. Y. 189.) rinciples here appealed to in construing chapter 522, of 1884, are all cardinal rules for the interpretation of es. (80 N. Y. 339; 99 id. 49; 55 id. 50; 5 Den. 9; 2 419; 1 Paige, 117; 32 Barb. 448; 68 N. Y. 591.) The laint demands appropriate relief. (*R. H. & L. R. R. N. Y., L. E. & W. R. R. Co.*, 110 N. Y. 134.)

J. Dean for respondents. By the condemnation pro- ngs under the New Parks Act (Chap. 522, Laws of 1884), nd in question was acquired by the city as part of St. 's park. (Laws of 1875, chap. 606, § 17; Laws of 1883, 253; *In re City of Buffalo*, 68 N. Y. 175.) On June 384, by the passage of the New Parks Act (Chap. 522, of 1884), the land in question in St. Mary's park was unded for the public use of a new park, and the filing of ailroad's petition on August 30, 1884, could not operate sturb the right of the public to the land for their new (*In re Department of Public Parks*, 53 Hun, 287; *e Munson*, 29 id. 325.) The land in question having taken for a public park, cannot be diverted to the pur- of a railroad. (*In re B. & A. R. R. Co.*, 53 N. Y. 575; *erson* v. *R., etc. R. R. Co.*, 9 How. Pr. 553; *In re N. B. B. R. R. Co.*, 20 Hun, 302.)

AY, J. The allegations of the complaint in this action ot in dispute, with respect to their recital of facts, of tes and of proceedings, and, by the demurrer interposed e defendants, a question of law is presented, which is of derable importance and is not free from difficulty.

e plaintiff was organized in 1880, as a railroad corpora- under the provisions of chapter 606 of the Laws of 1875, ly referred to as the "Rapid Transit Act." By the reso- n of the rapid transit commissioners, as embodied in the les of association, certain routes were determined upon.

and located, to which the necessary consents of the public authorities and of property owners were also obtained. Subsequently, by condemnation proceedings under the statute, the new company duly acquired the right to a strip through private lands, over which one of the routes had been located and concerning which the present controversy has arisen with the authorities of the city of New York. In June, 1884, chapter 522 of the Laws of that year was enacted by the legislature, by the provisions of which the laying out of certain new parks was authorized in the Twenty-third and Twenty-fourth wards of the city. One of these parks, therein designated as "St. Mary's Park," included within its limits the strip of land in question, which the railroad company claimed title to as a part of one of the located routes defined in its articles. The commissioners of estimate, for the appointment of whom this act made provision, in the course of proceedings by the city authorities to acquire the lands for the parks, reported upon a certain amount to be paid to the plaintiff as the value of the strip of land in question; which report was confirmed by the court, against the company's objection, made both to the taking of the land and because of the failure of the commissioners to make any estimate of the damage resulting from the deprivation to the company of its franchise. The plaintiff refused to take the amount of compensation adjudged to it; but the city authorities claimed, nevertheless, to have acquired the fee to the land, took possession thereof as a part of the authorized area of St. Mary's park and, by resolution of the Board of Commissioners of Public Parks and by acts of its officers, prevented the plaintiff from proceeding with any work of construction within that area. This action was then brought, on the equity side of the court, and the relief demanded is a judgment that, prior to the passage of the act creating the new parks, the plaintiff had the right to acquire for its railroad purposes the title to the strip of land through the tract designated as St. Mary's park; that by the proceedings of appraisal it had acquired that title and was not divested thereof by the order confirming the report of the commissioners under the New Parks Act, and

hat the defendants should be enjoined from preventing the laintiff from constructing its railways as required by its articles f association.

The court below, at Special and General Terms, has denied the plaintiff the relief it has demanded, and the learning and ility of the judges, whose opinions are contained in the cord before us, add to the responsibility of coming to a conusion at variance with that reached by them after their conleration of the questions. I am conscious, too, of the necesy of so expressing the reasons, which influence our conclus, as to lend to the force of mere authority the substance of nd judicial exposition.

The question, which is presented to us, relates to the effect the passage of the New Parks Act of 1884, upon any then sting franchises and rights of the plaintiff corporation. If its organization, under the Rapid Transit Act of 1875, it become possessed of the franchise to construct, operate and ntain its railroad over the routes designated and located by mayor's commissioners, which operated to vest in it a legal t to have the lands affected by the designation, then I k we must hold that the act of 1884 was inoperative to away, or to authorize the deprivation, or curtailment of a right.

he text of the opinions rendered in the Supreme Court is the plaintiff, at the time of the passage of the New Parks in 1884, had acquired no actual ownership in the land in ion and had not commenced the proceedings to acquire ownership. Therefore, it was considered that by the act 84 there was an exclusive devotion of the land to strictly purposes, which was a use inconsistent with a railroad use, hat any inchoate right, previously acquired by the plain- proceed to the acquisition of the land for the construcf its railway was defeated.

learned justices seem to have fallen into two errors. have given to the language of the New Parks Act a uction, by which the particular tract of land, designated Mary's park, is appropriated to such a purpose to the

exclusion of the plaintiff's railway, and they have failed to recognize the acquisition and possession by the plaintiff of an indestructible franchise, in the exercise of which the condemnation of the land was but an incidental feature and in furtherance of a scheme which the organization of the corporation had given vitality to and to which, in the view I take, the land had become subjected by the paramount exercise of sovereign power. The learned justice at Special Term admitted that, at the time of the passage of the New Parks Act of 1884, the lands through St. Mary's park "had been lawfully designated under a general act as part of the general route of the plaintiff's railroad;" but because not "devoted to a railroad use actually in exercise," he thought that "there was no actual prior use to be considered by the legislature."

In the discussion of this case, our first consideration should be given to the legal status of a corporation which has been organized under the Rapid Transit Act of 1875. When, by the determination of commissioners, appointed by direction of the act by the public authorities for that purpose, the public necessity for a railway has been established, they are required to fix and determine the route or routes of that railway; and they are given the exclusive power to locate them over the streets and lands in city or county. They must decide upon the plans for the construction of the railway or railways, with all the "accompaniments in tracks and buildings and other requisite appliances upon the route or routes, and in the locations determined by them." They must fix and determine the time within which such railway or railways, or portions of the same, shall be constructed and ready for operation; the maximum rate of fare and the amount of capital stock, etc. They must then prepare articles of association for the company to be formed, "in which articles shall be set forth and embodied as component parts thereof the several conditions, requirements and particulars" determined by the commissioners, pursuant to the preceding sections of the law; and which further shall provide for the release and forfeiture "to the supervisors of the county of all rights and franchises acquired

)y such corporation, in case such railway shall not be com-)leted within the time and upon the conditions therein pro-ided." When the whole capital stock has been subscribed, n books opened upon public notice by the commissioners, and he prescribed percentage has been paid in, the subscribers neet for organization and elect directors, to whom the com-issioners are to deliver a certificate of organization setting)rth the articles of organization. Three of the directors are en to make an affidavit as to stock subscriptions and pay-ents, and that it is intended in good faith to construct, main-in and operate the railway or railways in the articles of asso-*tion* mentioned. The certificates and articles are to be filed d "thereupon the persons who have so subscribed such icles of association and all persons who shall become stock-lders shall be a corporation, etc." (Chap. 606, Laws of 75, §§ 4 to 9.) All that the legislature has prescribed in se sections is essential to the legal incorporation of the new npany and for the enjoyment and enforcement by it of cor-ate rights and privileges; and, on the other hand, when so ally organized, the company's rights are fixed and its sphere l plan of operation are limited and rigidly defined. All remains for it to do is to proceed with the building and ration of its road, in the manner planned and upon the es located by the commissioners and which are set forth ts articles of association. Differing from the ordinary oad corporation organized under the General Railroad Act, h is privately formed, and which, as to the scope and con-ns of its undertaking, has little fixed upon organization, pt the termini of the road and the counties it will pass ugh, the company organized under the Rapid Transit Act 375 springs into existence fully equipped and endowed rights and privileges, with its line of way already desig-l and its structures and appliances already planned; of h nothing is alterable by its members. The act of 1875 scheme devised for furnishing, within large cities and nties, quick steam railway communications, and that the ruction of any such railway should only be when and

where a public necessity existed, and as would best subserve the public advantage. The determination as to the necessity and as to the number and location of the routes and as to details of the formal organization of the company, which should operate them, were matters entrusted to public agents, to be selected by the mayor of the city, or the county supervisors. Thus, these were fundamental features, which were planned for the new corporation, and were fixed and beyond the control or power to change of its future members.

With the ordinary railroad company, formed under the General Railroad Act, the enterprise, as to construction and operation, is inchoate, after it is erected into a corporation; whereas the corporation, which is erected under the Rapid Transit Act, commences its existence and operations with everything planned and, except in details, perfected. Its line of road is located and the streets, places, or lands, over which it is defined by the commissioners, are impressed with a public use and are dedicated to the purposes and uses of the corporation to be organized.

In the case of the *New York Cable Co.* v. *Mayor, etc., of New York* (104 N. Y. at p. 31), it was said of the Rapid Transit Act that its distinguishing feature was that "the company to be organized is not left at liberty, as are railroad companies formed under the General Railroad Act, and as were those which formerly were created by special acts, to decide for themselves upon the plan of construction; but that subject was placed under the exclusive control of the commissioners, in addition to the exclusive power to locate the route or routes." The route, or routes, located are unalterable by the company and I think the property, over which the line of the route runs, must be affected as fully for the purpose, as it would be in a case where, under the General Railroad Act, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road and has given the required notice to all persons affected thereby. In such a case, we have held that the corporation "has acquired the right to construct and operate a railroad upon such line,"

it "by its proceedings it has impressed upon the lands
n favor of its right to construct, which ripens into title
1 purchase, or condemnation proceedings." (*Rochester*
L. R. R. Co. v. *N. Y., Lake Erie & W. R. R. Co.*,
Y. 128.)

very scheme which the legislature devised and enacted
general law in 1875 involved the appropriation and
n of the lands, covered by the route designated by the
sioners, to the corporate use of the railroad company to
nized. That would seem to be a necessary and legiti-
nstruction, if we would give efficacy to the legislation,
se and force to the provisions for the creation of the
rporation, and for its confinement to certain routes in
ration of its corporate franchises.

ems to me that when the proceedings, instituted under
pid Transit Act of 1875, have terminated in the organi-
of a corporation, which must construct, maintain and
a railroad upon certain routes prescribed and located
missioners, as the public agents directed by the act to
ointed for that purpose, the lands necessary for the
have been as much appropriated and devoted to that
ve use by sovereign power, as though it had been so
d in some especial enactment. When the route or
were located, upon which the railroad of the new corpo-
should be constructed, what other legal effect could
except a subjection of the land affected to this species
ic use, as through the exercise of paramount right?
subsequent purchase, or condemnation of the title to the
n the course of the railroad construction, was merely
tal, and was necessary in order to compensate property
for the land taken, and to effect a transfer of the legal
The right which the plaintiff acquired to construct and
the railroad upon the route described in its articles of
ion lacked nothing for its efficacy or completeness. It
ome an obligation, and was one of the unalterable con-
and a fixed public feature of the corporate existence.
o it were subsequently added the consents of municipal

authorities and of property owners, was any feature wanting to the fullest franchise in such respects? To say that the right to appropriate the land on the designated routes for railroad uses was not vested, but merely inchoate, in my judgment would be a great misapprehension of the effect and value of formal proceedings conducted under legislative authority and direction, and of the formal consents of the public authorities to the projected line. A striking feature of this public law, which authorizes the appropriation of the streets and lands within a county for railroad uses, when the necessity for such has been determined by public commissioners, is the imperative nature of the direction to construct, under the penalty of forfeiture, within the time fixed and upon the conditions set forth in its articles. How can a franchise so conferred by the legislature be deemed inchoate and defeasible? Is not its possession an element of the security upon which capital has been subscribed and loans have been made to the company? The construction of this railroad had been proceeded with upon the plans of the commissioners and with reference to the projection of the route upon the line designated and consented to. The company's funds had been expended with reference to its road being constructed upon the plans and routes designated by the public agents. In the case of the Broadway Surface Railroad (*People* v. *O'Brien*, 111 N. Y. 1), the corporate franchise, acquired under the authority of the legislature and the consents of the municipal authorities, to lay tracks and to run cars upon Broadway, was held by us to be a right indestructible by the legislature, and to constitute property in the highest sense of that term.

I think we must conclude that the statutory proceedings, which resulted in the organization of the plaintiff corporation, had the effect of vesting in it the absolute and exclusive franchise to build upon the route located for it, and to the use of which the lands were devoted, through the exercise of the paramount right of sovereign power; which franchise was unimpaired, with respect to the right to take and use the land in question, by the fact that the work of actual construction

had not reached it, at the time the legislature passed the act for the new parks.

The articles of association, under which this corporation was formed, were its charter with the state, and though a deprivation of the franchises granted may be within the power of the legislature to authorize, if some public necessity should demand it, we should not deem that power exerted, in the absence of some unequivocal expression of the legislative intent.

The New Parks Act of 1884 does not expressly exclude the plaintiff from the tract appropriated to St. Mary's park; nor is there any reference to, or mention of the plaintiff in its provisions. Can we justly say that a legislative intention to make so exclusive an appropriation for park purposes appears from the terms of the act; shall we imply such an intention from its general grant of power? It is true that the legislature has said that the tracts designated for these parks "are all hereby declared to be respectively public places and public parks for public use and public purposes," but these are general terms, which describe the character and object of the legislative grant. They do not necessarily conflict with the completion and maintenance of the plaintiff's railroad upon a route authorized and located within the tract now set apart for one of the parks. The continuance of such a prior public use may have been deemed by the legislative body quite consistent with the new use of a public park. It may indeed be conceded that the legislature had in view, in enacting the New Parks Act, a particular and existing public need; but it is not necessarily to be inferred, or implied from language, which is applicable to a legislative provision for that purpose, that a prior public use, also intended for the public accommodation, is to be destroyed. It is wiser to assume that the legislature intended that the two uses should stand together, as equally subserving the public interests. The integrity of the prior appropriation for the purposes of the plaintiff's incorporation should not be assailed upon the basis of an implication from the general terms of an act, which we may believe to have been framed with actual knowledge of the plaintiff's condition and

upon the belief that the operation of the plaintiff's franchises, as directed in its articles, would be in the line of the general public interests. If it was necessary to the conclusion to establish knowledge upon the part of the legislature as to the plaintiff's incorporation and construction, that could be shown by the fact that there was made to that body a report by its commission; to which reference is made in the act and which contained information of the plaintiff's progress in the work of construction; but such knowledge is not essential. What we hold is that as the legislature, in enacting this chapter providing for the creation of new parks, did not expressly confer the power upon the defendants to take the lands for such a purpose, to the exclusion and deprivation of the plaintiff company, such a power does not flow from the general and descriptive terms, in which the legislature declared the object in view. There is not enough in the New Parks Act to warrant the presumption that its effect was meant to extend to the injury of the other important public use. The appropriation of the described tract to the purposes of a public park was subject to the exercise by the plaintiff of its franchise to maintain and operate its railroad upon the strip of land across the park. The power, which had been conferred upon it to proceed with and upon such a route, was never taken away, expressly, or by any reasonable intendment, and the subsequent appropriation of the tract to a public park use was necessarily made subject to the plaintiff's chartered rights.

The case of *The Matter of the City of Buffalo* (68 N. Y. 167) is much in point, upon the intent to be ascribed to the legislature. There the act in question (which was the city's charter) authorized the city to acquire the fee of any lands within its boundaries for canals and other public uses, and it endeavored to extend a canal through lands already appropriated for railroad purposes. It was held that if there had been a legislative appropriation of the lands to another important public use, it was not to be presumed that the unlimited power of the city to take any lands was meant to extend so as injuriously to affect the railroad use. It was said that "a legislative

intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose, to which lands have already been subjected, the legislative intent must unequivocally appear." And it was considered to be manifest that the city's project would not be a tolerable interference with the existing public use of the railroad, which might be compensated for in damages, but an entire superseding of it by another public use; which effect the court refused to presume the legislature intended. The fact that in that case the power to take was as to any and all lands within the city boundaries, while, in the present case, the power is conferred as to a particular tract, is not material. In the absence of express language, no implication of an intention to supersede the prior devotion to the public use of the plaintiff's railroad can be predicated upon the general terms of an act, which does not require such by reason of some inherent necessity, or for the attainment of an object not otherwise to be effected. A construction of an act should be avoided which would injuriously affect the rights of others, and that sense should be attached to its provisions which will harmonize its objects with the preservation and enjoyment of all existing rights. Considered in this way, the act of 1884, creating these public parks, leaves intact and unaffected the public railroad uses, to which the lands included within the park areas had been subjected; whether, as in the present case, the railroad was not yet actually constructed upon the land appropriated for the purpose, or, as in several known instances, the railroad was in actual operation. Though, in a certain sense, a public park use may be said to be inconsistent with a railroad use of property, still that is not a view which we should logically take, when considering the effect of the legislative appropriation to park uses upon another important public use, previously authorized by the legislature. The public accommodation is the object of the latter, as the public pleasure and recreation are the objects of the former. We may justly assume, from the absence of explicit language, or from the knowledge pos-

Statement of case.

sessed by the legislative body of the facts, that the park use was believed to be subserved by the continued operation of the railroad. However that may be, the subsequent appropriation of the lands to park purposes, for want of terms conveying a different intention, was subject to all rights acquired by the plaintiff corporation and to the operation of its franchises.

The complaint sufficiently set forth the grounds upon which the plaintiff was entitled to relief, and the judgments and orders at the Special and General Terms below should be reversed; the demurrer interposed by the defendants to the complaint should be overruled, and judgment should be entered below against the defendants granting to the plaintiff the relief prayed for.

All concur.

Judgment accordingly.

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THE PEOPLE ex rel. JOHN WILSON COCHRANE, as Administrator, etc., Respondent, *v.* MICHAEL COLEMAN et al., Commissioners, etc., Appellants.

One S., a resident of Scotland, died there in 1881, leaving a will which appointed as sole executrix a resident of that country. All the residuary legatees were and still are residents of this state. Letters testamentary were issued to the executrix, and in 1882 ancillary letters of administration were issued by the surrogate of the county of New York to C., the petitioner herein, a resident of this state, who accepted and has continued to act thereunder. At the time of his death, S. owned personal property in this state, consisting mostly of debts due him from residents. In a proceeding to review an assessment, made in 1890, of said assets, which had remained in C.'s hands, against him as administrator, *held*, that the property was properly so assessed (1 R. S. 419, § 3); that C. was not entitled to exemption as an agent having moneys, in his possession or under his control, transmitted to him for investment or otherwise (1 R. S. 389, § 5); also that a sufficient period had elapsed since C.'s appointment to change the original character of the funds, assuming that they had been sent here and placed in his hands for investment; that it was his duty as administrator to distribute the assets as directed by the will subject to the lawful orders of the surrogate and to the rights

Statement of case.

of resident creditors, and the resident distributees could not, by leaving them in his hands, escape taxation.

People ex rel. Ferrer v. *Comrs. of Taxes* (42 Hun, 560; 105 N. Y. 629); *Williams* v. *Supvrs. of Wayne Co.* (78 id. 561), distinguished.

(Argued October 5, 1891; decided October 20, 1891.)

APPEAL by defendants, commissioners of taxes and assessments of the city of New York, from order of the General Term of the Supreme Court in the first judicial department, made May 15, 1891, which affirmed an order of Special Term, vacating an assessment against the petitioner for personal property, and striking the assessment from the assessment-roll as illegal.

William Smith, a resident of Scotland, died there in the year 1881, leaving a will in which he appointed his widow, Margaret Smith, sole executrix. The widow has continued to reside in Scotland, but all the residuary legatees under the will were, at the death of the testator and ever since have been, residents of this state. Letters testamentary were issued to the widow in Scotland. An exemplification of the will was filed and recorded by direction of the surrogate in the county of New York, on the 12th day of July, 1882, and on the 21st day of September, 1882, ancillary letters of administration, with the will annexed, were issued by the surrogate to the relator herein, John Wilson Cochrane, of the city and county of New York, who acccepted the same and has ever since continued to act as such administrator.

At the time of the death of Mr. Smith, he owned personal property, the situs of which was in fact in the city of New York, and such property consisted, for the most part, of debts owed to Smith by residents of New York city, including certain bonds secured by mortgages of real estate in that city, the investments in which bonds and mortgages were made by him in his life-time, and these bonds and mortgages came into the hands of the relator as his administrator.

The relator in these proceedings set forth in his petition that the bonds and mortgages, as such, came into his possession as administrator, and that they were never sent to this state or

deposited in this state by Mr. Smith as a non-resident for collection or otherwise, and that they did not belong to a non-resident of the state as owner, but belonged to the relator as administrator as owner. The relator's petition contained a further statement that the larger part of the testator's personal property, amounting to something less than $30,000, consisted of the proceeds of merchandise manufactured by him in Great Britain and shipped by him to New York for sale, and which had been sold here in his life-time, and the moneys therefor paid and earned here, and at the time of his death the proceeds remained here uninvested and subject to his order; that this asset was in form a debt of a resident of New York to him on book account, which asset and the legal title thereto, upon the appointment of the relator as administrator, he alleges, became vested in him as such, and that no part of the personal property of Smith represented moneys transmitted here for investment or otherwise, and that the bonds and mortgages and the moneys represented thereby and the moneys representing the proceeds of the merchandise, have never been out of the city of New York.

The relator further alleged in his petition that the taxing authorities had assessed this property against him, and had decided that it was not exempt. The relator, therefore, presented his petition for a certiorari to the Supreme Court to review the question and now claims that the property is exempt from taxation.

D. J. Dean for appellants. The property in the possession or control of the relator was not exempt from taxation under the laws of New York. (*People ex rel.* v. *Tax Comrs.*, 100 N. Y. 215; *People ex rel.* v. *Tax Comrs.*, 119 id. 137; 42 Hun, 562.)

Evarts, Choate & Beaman for respondent.

PECKHAM, J. There is no dispute as to the facts in this case. The allegations contained in the relator's petition as to the property in question are uncontroverted and the simple question is whether upon such facts the relator or the defendants are correct.

The claim of exemption is based upon two different sections of the Revised Statutes. They are as follows:

"§ 5. Every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, including all personal estate in his possession or under his control as agent, trustee, guardian, executor or administrator, and in no case shall property so held under either of those trusts be assessed against any other person, and in case any person possessed of such personal estate shall reside during any year in which taxes may be levied in two or more counties, towns or wards, his residence for the purposes and within the meaning of this section shall be deemed and held to be in the county, town or ward in which his principal business shall have been transacted; but the products of any state of the United States, consigned to agents of any town or ward of this state for sale on commission, for the benefit of the owner thereof, shall not be assessed to such agents, nor shall such agents of moneyed corporations or capitalists be liable to taxation under this section for any moneys in their possession or under their control transmitted to them for the purpose of investment or otherwise." (1 Rev. St. 389, § 5.)

"§ 3. When any bond, mortgage, note, contract, account, or other demand, belonging to any person not being a resident of this state, shall be sent to this state for collection, or shall be deposited in this state for the same purpose, such property shall be exempt from taxation; and nothing contained in this chapter shall be construed to render any agent of such owner liable to be assessed or taxed for such property; but every such agent shall be entitled to have any such property deducted from his assessment upon making affidavit before the assessors at the time appointed by them for reviewing their assessments, that such property belongs to a non-resident owner, and therein specifying his name and residence." (1 Rev. St. 419, § 3.)

The administrator was not, after his appointment, the agent of the deceased testator, and hence he was entitled to no exemption as an agent having moneys in his possession or under his control transmitted to him for investment or other-

wise, as provided in the first of the above cited sections. The administrator says, indeed, that the moneys never were transmitted to him by testator for investment or otherwise; but if we assume that his statement in that respect was a conclusion of law and that he was mistaken, we find that the moneys were transmitted not later than 1881, and that in such year the testator died, and since the year 1882 the funds, or debts, or bonds and mortgages have been in the hands of the relator as administrator as owner, and not as agent of any one. His duty in regard to such funds is to distribute them as ordered by the will, subject to the lawful orders of the surrogate of the county in which the letters issued, and also subject to whatever rights the creditors resident in this state might have in regard to them. He was to distribute or pay debts. Certainly from the time when these ancillary letters were issued, which was in 1882, up to 1890, when this assessment was made, a sufficient period had elapsed to wholly change the original character of the funds, even assuming they were sent here for investment and were placed in the relator's hands for that purpose, and had been thus invested. If not, then a resident administrator, at the request of the distributees, could hold such funds permanently and pay the interest to the distributees, who might all be residents, and so in this manner such distributees could secure the exemption of the property from taxation while enjoying the protection of our laws and themselves residing here.

It does not seem that the case of *Ferrer* v. *Comrs. of Taxes* (42 Hun, 560; Affd. in Memoranda, 105 N. Y. 629) is at all like this. The funds in that case were originally sent by the testator from Cuba here for investment. The testator died and the relator, a resident of Cuba, was appointed his executor. Such executor came here and took out letters for the sole purpose of obtaining the moneys and disposing of them under the terms of the will, which directed him to invest a large portion of them in bonds of the United States. It was held that the funds were exempt because, as the court said, they had been sent here for investment and were still in the hands of the

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original agent, and the testator had not changed his purpose up to the time of his death. The ancillary administrator was himself a non-resident, not subject to taxation, and the character of the funds in the hands of the New York agent had not changed so as to become taxable simply because of the death of their former owner so short a time before. Here the administrator takes the funds and as such has them in his possession and has held them for eight years, and he is a resident and the residuary legatees are residents. The *Ferrer* case is no authority for the decision herein appealed from.

Nor is the case of *Williams* v. *Supervisors of Wayne Co.* (78 N. Y. 561) at all like this. The property there was assessed to the plaintiff as agent, and it consisted of bonds and mortgages, some of which had been sent him for collection by the owner, who was a non-resident of the state, and the balance had been left or deposited with him for collection by such owner. This court held the property was exempt.

We think no exemption was made out under either of the above quoted sections of the statute, and for this reason the orders of the General and Special Terms should be reversed, the assessment reinstated and the writ dismissed, with costs in all courts.

All concur.

Orders reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* NICOLA TREZZA, Appellant.

THE PEOPLE ex rel. NICOLA TREZZA, Appellant, *v.* A. A. BRUSH, as Agent, etc., Respondent.

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151	56
f151	610
128	529
j156	62
128	529
f163	107
163	108

The right of appeal in criminal cases is statutory only, and in the absence of a statute authorizing it in a given case, no appeal can be taken.

An order denying a motion for a new trial, made in a criminal case, after final affirmance of a judgment of conviction, upon the ground of newly-discovered evidence, is not reviewable here, either upon appeal or certiorari.

Such an order is only reviewable in connection with, and upon appeal from the judgment, and when it is embodied in the judgment-roll. (Code Crim. Pro. §§ 485, 517.)

Statement of case.

It is not essential to the validity of a sentence in a capital case that it shall state the mode in which the death penalty is to be inflicted; a statement that it shall be in the "mode by law prescribed and provided" is sufficient.

An appeal under the provision of the Code of Criminal Procedure (§ 528, as amended by chap. 493, Laws of 1887), to this court from a conviction in a capital case, stays the judgment of death, but not that part providing for the custody of the defendant between his removal to the state prison and his execution.

In proceedings by habeas corpus, it appeared that the relator was convicted of the crime of murder and sentenced to death; that he appealed to this court, where the judgment was affirmed; that after the appeal he was taken to state prison and there detained in close confinement. One ground upon which the prisoner's discharge was asked was that he had been once punished by imprisonment. *Held*, untenable; also that if the appeal operated to stay the continuance of the close confinement as well as the execution of the death penalty, then his subsequent imprisonment was unlawful, and the convict could not elect to submit to it and then treat it as a satisfaction of the sentence.

(Argued October 5, 1891; decided October 20, 1891.)

APPEAL, in the first above-entitled matter, from order of the General Term of the Supreme Court in the second judicial department, made August 7, 1891, which affirmed an order of Special Term denying a motion for a stay of proceedings.

Appeal, in the second above-entitled matter, from an order of the General Term of the Supreme Court in the second judicial department, made August 7, 1891, which affirmed an order of Special Term dismissing a writ of habeas corpus.

The nature of the proceedings and the facts, so far as material, are stated in the opinion.

A. H. Dailey for appellant. It is the duty of the court in pronouncing a sentence of death, to prescribe the mode and manner in which the person convicted should be executed. (Penal Code, §§ 9, 10, 12, 13; Laws of 1888, chap. 489, §§ 492, 505, 506; *Lowenburg* v. *People*, 27 N. Y. 336; Laws of 1860, chap. 410; *In re Hoffman*, 1 N. Y. Cr. Rep. 484; *People* v. *Griffin*, 27 Hun, 595.) The sentence is unlawful in this, that under the two sentences of the court, the carrying into effect of the second subjects the relator to cruel and unusual punish-

ment (§ 5, art. 1, State Const.), and is also in violation of section 6, which declares that no person should be subject to be twice put in jeopardy for the same offense, nor deprived of life, liberty or property without due process of law. The court below takes the ground that the stay referred to in the statute only stayed the execution of the death penalty, but did not stay the rest of the punishment; it cannot thus limit the plain import of the statute. (Code Crim. Pro. § 528.) Defendant is entitled to this form of remedy for relief. (*People ex rel.* v. *Liscomb*, 60 N. Y. 559; *Rex* v. *Collyer*, Sayer, 14; *Crepps* v. *Durden*, 2 Cowp. 640; *People* v. *Cassels*, 5 Hill, 164; *Bigelow* v. *Forest*, 9 Wall. 339.) An appeal from the order denying a new trial upon the ground of newly-discovered evidence does necessarily lie to the Supreme Court. (Code Crim. Pro. §§ 485, 515, 517, 519, 520, 527.)

John F. Clarke for respondent. The sheriff's action was lawful. The statute stays the execution, but does not stay any other part of the judgment. (Code Crim. Pro. § 528.) The warrant under which defendant is held complies with the law. (Code Crim. Pro. §§ 491–509.) The right of appeal in criminal cases is purely statutory, and in the absence of express statutory permission no appeal can be had. (*People* v. *Havens*, 3 Crim. Rep. 286; *People* v. *Trumble*, 1 id. 443; *People* v. *Snyder*, 44 Hun, 193; *People* v. *Beckwith*, 42 id. 366; *People* v. *Nestle*, 19 N. Y. 583; *People* v. *Dempsey*, 31 Hun, 528; Code Crim. Pro. §§ 485, 517; *People* v. *Hovey*, 30 Hun, 357; Sutherland on Stat. Const. §§ 400, 415; *People* v. *Hadden*, 3 Den. 220; *Tyman* v. *Walker*, 35 Cal. 634.)

ANDREWS, J. The appeal in the case first entitled is from an order of the General Term of the second department affirming an order made by Justice CALVIN E. PRATT denying an application of Trezza for a stay of proceedings pending an appeal by him to the General Term of the Supreme Court, from an order of the Court of Sessions of Kings county denying his motion for a new trial on the ground of newly-dis-

covered evidence. Trezza was tried, convicted and sentenced at the Court of Sessions of Kings county for the crime of murder in the first degree. He appealed from the judgment to the Court of Appeals, under the statute, chapter 493 of the Laws of 1887, where the judgment was affirmed. The motion for a new trial was made after judgment of affirmance had been rendered. The motion to stay proceedings was denied on the ground that there is no statute authorizing an appeal from an order denying a motion for a new trial under the circumstances of this case. The refusal of the stay was plainly correct if no right to appeal from the order refusing a new trial in such case existed.

The right of appeal in criminal cases is statutory only, and in the absence of a statute authorizing an appeal in a given case no appeal can be taken. The court in which the trial of an indictment is had has power to entertain a motion for a new trial on the ground of newly-discovered evidence (Code of Crim. Pro. §§ 463, 465), and may grant or refuse it. The Code of Criminal Procedure (tit. XI) defines and regulates the right of appeal in criminal cases. Section 517, as originally enacted, was as follows: "Sec. 517. An appeal to the Supreme Court may be taken by the defendant from the judgment on a conviction after indictment, and upon any appeal any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed in section 485, may be reviewed." By section 485 a copy of the minutes of any proceedings upon a motion for a new trial is required to be annexed to and forms a part of the judgment-roll. Section 517 was amended by chapter 493 of the Laws of 1887 by providing that when the judgment is of death the appeal must be taken direct to the Court of Appeals, and that court was authorized to review any intermediate order or proceeding forming part of the judgment-roll, as the Supreme Court was authorized to do by the original section.

It will be observed that the section only authorizes a review of intermediate orders and proceedings in connection with an appeal from the judgment, and when they are embodied in

the judgment-roll. There is no statute provision authorizing an appeal from an order denying a new trial, except as incident to an appeal from the judgment. It is said that the legislature could not have intended to permit an appeal from such an order in that case, and to deny it where the application for a new trial is made after final judgment of affirmance and denied when it would be too late to make the proceedings a part of the judgment-roll. The legislature seemed to assume that such proceedings would in all cases be taken before an appeal from the judgment. It may be that the failure to provide for an appeal in such a case as this was *casus omissis*. But the courts must be guided by the law as it is, and cannot give an appeal where none is given by the statute, and there is no statute authorizing an appeal from an order denying a new trial made after the roll is made up and the final affirmance of the judgment. The contention that the legislature in abolishing writs of error and certiorari, as was done by section 517, did not intend to take away any remedies formerly obtainable in those proceedings, has no force for the reason that neither a writ of error nor certiorari would bring up for review an order denying a motion for a new trial made on the ground that the verdict was against the weight of evidence, or on the ground of newly-discovered evidence. (*Shorter* v. *People*, 2 N. Y. 193; *Manke* v. *People*, 74 id. 415; *People* v. *Casey*, 72 id. 393; *Hunt* v. *People*, 76 id. 89; *People ex rel. Folk* v. *Bd. Police, etc.*, 69 id. 408; *People ex rel. S. & U. H. R. R. Co.* v. *Betts*, 55 id. 600.) There was no error in the order of the General Term affirming the order of Justice PRATT, refusing a stay of proceedings, and it should, therefore, be affirmed.

The appeal in the second case above entitled is from an order of the General Term affirming an order of Mr. Justice CULLEN, dismissing a writ of habeas corpus granted upon the application of Trezza for his discharge from imprisonment in the state prison at Sing Sing, and remanding him to the custody of the agent and warden.

When the writ was granted, Trezza was held by the agent and warden under a warrant issued by the Court of Sessions

of Kings county, dated March 6, 1891, reciting his conviction on an indictment charging him with the crime of murder of one Alexander Salvano in that county on the 6th day of April, 1890; his trial, conviction and sentence to the punishment of death, and directing that he be delivered by the sheriff within ten days from the date of his sentence to the said agent and warden of the state prison at Sing Sing, and that said agent and warden within the week beginning Monday, the 21st of July, 1890, execute him, the said Trezza, "by putting him to death in the mode, manner and way, and at the place by law prescribed and provided." The warrant further recited that Trezza, on the 11th of June, 1890, appealed from the judgment to the Court of Appeals, which court affirmed the judgment February 24, 1891; that Trezza was resentenced by the Court of Sessions of Kings county, to be executed during the month beginning Monday, the 20th day of April, 1891. It then proceeds to command the agent and warden to whom it was addressed to cause the said judgment and sentence to be executed within the week last mentioned, "by putting him, the said Nicola Trezza, to death in the mode, manner and way, and at the place by law prescribed and provided." It appears that after the appeal taken by Trezza, he was taken to Sing Sing prison and there detained in close confinement, where he remained until he was taken to Kings county for resentence, and was then remanded again to the custody of the agent and warden of the state prison.

There are two grounds urged for the discharge of Trezza; *first*, that the sentence did not specify the mode in which the death should be inflicted, viz.: that provided by the statute of 1888, "by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict be dead." We think there is no ground for this contention. The agent and warden was commanded to put the convict to death in the mode provided and prescribed by law. The recital in the warrant showed that the convict was convicted for murder committed after the statute of 1888 was

passed and, therefore, was subject to that statute. The sentence was death. This was not left to inference, and the warrant commanded the punishment to be inflicted. The agent and warden was required to inflict it in the mode provided by law, and this law he must be presumed to have known. The court presumably could not prescribe by any measurement the intensity of the current of electricity required to produce death, or specify the exact time the current should be continued. These things must of necessity be left to the judgment of the agent or warden. We think the warrant was sufficiently definite and specific. It undoubtedly was the practice when death by hanging was the mode of punishment prescribed in cases of convictions for capital offenses, to specify this in the sentence and judgment. This practice was derived from the common law, which prescribed different modes of death in different cases and was adopted to distinguish this mode of execution from that in cases of conviction for high treason and other atrocious crimes, where the judgment directed that the condemned person should be drawn to the place of execution, embowelled alive, and then he beheaded and quartered. (2 Black. Com. 376; 2 Hale's P. C. 412.) But here, where but one mode of execution exists, no greater particularity than that employed in the judgment in question seems to be necessary. (See *People* v. *Bork*, 96 N. Y. 188; *People ex rel. Van Houten* v. *Sadler*, 97 id. 146; *Weed* v. *People*, 31 id. 465.) The objection is, we think, untenable.

The *second* ground upon which the discharge of Trezza is claimed is that he has been once punished. The argument is that the appeal to the Court of Appeals after the first sentence, stayed both the execution of the direction that Trezza should be kept in solitary confinement until the execution of the death penalty, as well as the part of the sentence that he be put to death, but that as his solitary confinement in the state prison was continued pending the appeal, and that, as was held in the case *In re Medley* (134 U. S. 160), the sentence to solitary confinement accompanying the death sentence is a part of the punishment, he has suffered that part once and could not

lawfully be resentenced to close confinement, to be followed by death. If the counsel is right in respect to the operation of the appeal, as staying both a continuance of the close confinement and the execution of the death penalty, then it simply follows that Trezza was unlawfully imprisoned, and the usual remedy for the illegal restraint was open to him. The restraint was in this view not the act of the law, but the illegal act of the agent or warden. The convict could not elect to submit to it, and then treat it as a satisfaction of the sentence. But we agree with the learned judge before whom the proceeding was taken, that by the true construction of section 528 of the Code of Criminal Procedure, as amended in 1887, an appeal to this court from a conviction in a capital case, stays the judgment of death only, and not that part of the judgment providing for the custody of the defendant, between his removal to the state prison and his execution. This would seem to be all that a convicted criminal could of right demand, and an opposite construction would occasion much inconvenience. Whether an appeal in a criminal case stays the execution of the sentence, depends upon the statute. It not infrequently happens that the execution of a sentence to imprisonment continues, notwithstanding an appeal. The convict, if he obtains a reversal of the judgment, and is again convicted on a second trial, may be sentenced to a new term of imprisonment, and the court is not bound to regulate the second sentence in view of the fact that the convict has already suffered imprisonment under the first sentence. The resentence in the present case was rendered necessary by reason of the fact that Trezza, by his own act in his own interest, had by his appeal prevented the execution of the death penalty at the time fixed by the first sentence.

The construction of section 528 is not entirely clear, but the construction we have given is justified by the language, and it probably accords with the intention of the legislature.

We think the order in this case should be affirmed.

All concur.

Order affirmed.

Statement of case.

ALEXANDER T. COMPTON, Appellant, *v.* THE CHELSEA, Respondent.

Defendant is a corporation organized under the act of 1881 (Chap. 589, Laws of 1881), for the purpose of erecting an apartment house. In the prospectus issued for the purpose of inviting subscriptions for the stock, it was stated that a subscription for seventy shares would entitle the subscriber to certain apartments without additional rent. By the by-laws adopted by the corporation, it was provided that "all questions * * * as to how and to whom and at what rent the several apartments shall be leased, and as to the apportioning and distributing of the said apartments among the stockholders, shall be decided by the vote of the majority of the stock, and not otherwise." Notwithstanding this, the directors adopted the prospectus, and in pursuance thereof a certain apartment was assigned to C., a subscriber. At a stockholders' meeting thereafter held, at which plaintiff was present as the representative of a stockholder, the by-laws were read and changes were made in the plans greatly increasing the expenditures; plaintiff voted in favor of the change; he subsequently purchased C.'s stock and took possession of the apartment assigned to him, which he leased. At a stockholders' meeting held thereafter, but before the stock was transferred to plaintiff on the books of the corporation, it was unanimously resolved that, in view of the increased expenditure, the capital stock should be increased, and that the stockholders should be charged ten per cent on the par of their stock as rent. Upon the transfer of the stock to plaintiff, he received a certificate for his proportion of the new shares, as well as for those purchased; he refused, however, to pay the rent, and when his apartment was vacated by his tenant, the corporation took possession and excluded him therefrom. In an action to recover possession, *held*, that plaintiff took his stock subject to the control of the stockholders as provided in the by-laws; that he had no legal title to the apartment, but simply an equitable right to it upon the conditions imposed by the stockholders' meeting, and by rejecting those conditions he lost that right, and so, had no title upon which he could recover possession.

(Argued October 15, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 13, 1891, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

Statement of case.

This was an action of ejectment to recover possession of a suite of rooms in an apartment house.

The defendant was organized under what may be called the Apartment House Act (Chap. 589, Laws of 1881). The capital was fixed at $290,000, the number of shares of stock was 5,800, the par value of the shares $50 each.

Before the organization of the company a prospectus was issued, setting forth what it was proposed to do and the advantages which would result from subscriptions, and showing by what investments apartments might be secured. The circular stated that the holding of seventy shares of the stock would entitle the owner to a virtually perpetual lease of an apartment. Subscriptions were made, and opposite the subscriptions were placed the numbers designating the apartments which the subscribers selected. Among other subscribers was a subscription for seventy shares in the name of A. B. Cruikshank, and opposite to which was mentioned the apartment in question. By arrangement between the parties in January, 1883, a certificate for said seventy shares was issued to Thomas C. Van Brunt. In October, 1882, at a meeting of the trustees, by-laws were adopted by which it was provided that all questions as to the purchasing of land, the character and style of buildings to be erected, and as to how and to whom and at what rent the several apartments should be leased, and as to the apportionment and distribution of the apartments among the stockholders should be decided by a vote of a majority of the stockholders, and not otherwise. At the same time and after the adoption of the by-laws, the trustees adopted the prospectus aforesaid as the prospectus of the defendant. On the fourteenth of December, at a meeting of the stockholders, the subscribers were assigned the apartments selected by them; shares were purchased by plaintiff in January, 1883, but no transfer thereof was made to him on the books of the corporation. The defendant commenced the construction of the house early in 1883. At a meeting of the stockholders held in December, 1882, the plan of the building was changed, whereby the cost was very much increased, and in January, 1884, the capital

Statement of case.

stock was increased from $290,000 to $500,000, such additional stock being distributed among the stockholders without anything being paid therefor. On the 23d of January, 1884, the trustees passed a resolution recommending to the stockholders, at a meeting to be called thereafter, that an annual rental equivalent to ten per cent of the face valuation of the stock held by each on the basis of $500,000 be the rental fixed by this company to its stockholders on their respective apartments. On the 29th of January, 1884, and before the distribution of the increased stock, a meeting of the stockholders was held at which more than a majority were present, and unanimously passed resolutions, Van Brunt, the holder upon the books of the company of the seventy shares in question, being present and voting therefor, that an annual rent equivalent to ten per cent of the value of the stock on the basis of an issue of $500,000 should be charged and collected from each stockholder, and that the trustees were authorized to draw up a suitable form of lease to be executed to stockholders upon said basis.

Plaintiff was present at the meeting as the representative of his wife, a stockholder, and voted in favor of the resolution. In June, 1884, the trustees ordered the leases to stockholders to be executed by the president. In September, 1884, the trustees approved and adopted the form of lease. In October, 1884, the building having been completed, the plaintiff obtained the keys of the apartment assigned to him and took possession of his apartments, and expended certain moneys on the completion of the same. On the 1st of December, 1884, the plaintiff rented the premises. On the 11th of May, 1885, the plaintiff surrendered the certificate which he had received from Van Brunt of the seventy shares and received in lieu thereof the original seventy shares and sixty-seven additional shares of the increased stock. In the summer of 1885 a lease of the apartment, duly executed by the president, was tendered to him. He declined not only to accept this but any lease. In October, 1886, the apartments having been vacated by the plaintiff's tenant, the defendant took possession, whereupon the plaintiff brought this action of ejectment.

Statement of case.

A. T. Compton for appellant. The prospectus, the subscription, the resolution adopting the prospectus and the assignment of the apartments, entitled each stockholder, on payment for his stock, to the apartment subscribed for and assigned to him. (*Boardman* v. *L. S. & M. S. R. Co.*, 84 N. Y. 157; *Lorillard* v. *Clyde*, 86 id. 384; 81 id. 468; *Kent* v. *Q. M. Co.*, 78 id. 159; *L. O., etc., R. R. Co.* v. *Mason*, 16 id. 451; *U. H. Co.* v. *Hersee*, 79 id. 455; *Burr* v. *Wilcox*, 22 id. 551.) The plaintiff purchased this stock and the apartment therewith connected from said Van Brunt, and, as assignee, acquired all his rights. (*Sheridan* v. *Mayor, etc.*, 68 N. Y. 30; *Routledge* v. *W. Co.*, 119 id. 592; *Isham* v. *Buckingham*, 49 id. 216; *Jones* v. *T. H. R. R. Co.*, 57 id. 196; *Cutting* v. *Dameral*, 88 id. 410; *Peterson* v. *Mayor, etc.*, 17 id. 449; *Hoag* v. *Lamont*, 60 id. 96, 101; *Blake* v. *Griswold*, 103 id. 429, 434; *Trustees, etc.*, v. *Smith*, 118 id. 634, 641.) No additional instrument was necessary to vest in plaintiff the title to the apartment in question. (*Tuffts* v. *P., etc., Co.*, 96 Mass. 407; *A. Co.* v. *Mayor, etc.*, 55 N. Y. 495; Laws of 1848, chap. 40, § 7; *Burr* v. *Wilcox*, 22 N. Y. 551; *Van Dyck* v. *McQuade*, 86 id. 38; *Beveridge* v. *N. Y. E. R. Co.*, 112 id. 1; *Wood* v. *Fleet*, 36 id. 499; *Taylor* v. *Millard*, 118 id. 244; *Miller* v. *Ball*, 64 id. 286; *J. P. Co.* v. *Chandler*, 91 Mass. 159.) No action was taken by the stockholders or trustees effectual in law to divest plaintiff of his title to this apartment. (*Whittlesey* v. *Franz*, 74 N. Y. 456; *Humphreys* v. *N. Y., L. E. & W. R. R. Co.*, 121 id. 435; *Vail* v. *Hamilton*, 85 id. 453; *Ward* v. *H. R. B. Co.*, 125 id. 230, 235; *Noyes* v. *Anderson*, 124 id. 175; *Coe* v. *Hobby*, 72 id. 141, 146, 147; *Bedford* v. *Terhune*, 30 id. 453, 463; *Chamberlain* v. *Dunlap*, 126 id. 45, 51; Laws of 1848, chap. 40, § 6; 1 Potter on Corp. 125; *In re L. I. R. R. Co.*, 19 Wend. 37; *Halpin* v. *Ins. Co., N. A.*, 120 N. Y. 73, 78; *Wakefield* v. *Fargo*, 90 id. 213.) The by-laws did not authorize the affixing of a rental to the apartments purchased by and apportioned to the stockholders. (Laws of 1848, chap. 40, § 7; Angell & Ames on Corp. [11th ed.] § 333; *Kent* v. *Q. M. Co.*, 78 N. Y. 159.)

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Plaintiff was in, and entitled to, the lawful possession of the apartment in question. The eviction was illegal. Ejectment will lie to recover possession. (*Bristor* v. *Burr*, 120 N. Y. 427, 433; *In re L. I. R. R. Co.*, 19 Wend. 37; *Dater* v. *T., etc., Co.*, 2 Hill, 629; *Leprell* v. *Kleinschmidt*, 112 N. Y. 364; Code Civ. Pro. § 3343; *Ellicott* v. *Mosier*, 7 N. Y. 201.) The direction of a verdict for defendant was error. (*Bagley* v. *Bowe*, 105 N. Y. 171; *Clemence* v. *City of Auburn*, 66 id. 334; *Stone* v. *Flower*, 47 id. 556.) The exclusion of the evidence to which plaintiff excepted, of what Mr. Hurbert, the agent of the company in the sale of its stock and a director, told the plaintiff as intended purchaser as to the ownership of the apartment in question was error. (*Beckford* v. *Menier*, 107 N. Y. 490; *Leslie* v. *K. Ins. Co.*, 63 id. 27; *Chadwick* v. *Farmer*, 69 id. 404; *Mayer* v. *Dean*, 15 id. 556.) The admission of the resolutions of the meeting of the stockholders of January 29, 1884, on objection as incompetent and immaterial, was error. (Angell & Ames on Corp. [11th ed.] §§ 489, 492; *People* v. *Batchelor*, 22 N. Y. 128; *Pearsall* v. *W. U. T. Co.*, 124 id. 256; *Rudd* v. *Robinson*, 126 id. 113; *Newhall* v. *Appleton*, 124 id. 668.) The admission of the lease on objection and exception as incompetent and immaterial was error. (*Brown* v. *N. Y. C. & H. R. R. R. Co.*, 44 N. Y. 76; *P. Bank* v. *S. A. R. C. Church*, 109 id. 512.) The conclusion of the court below that the original contract was modified was error. (Angell & Ames on Corp. [11th ed.] § 233; *Moss* v. *Averill*, 10 N. Y. 449; *Sheehan* v. *Hamilton*, 4 Abb. Ct. App. Dec. 211; *Phillips* v. *Gorham*, 17 N. Y. 270; *Wallace* v. *Walsh*, 125 id. 26; *Barr* v. *N. Y., L. E. & W. R. R. Co.*, Id. 263.) Plaintiff's assignor could not, after the sale of the stock, do anything which in law or equity would affect plaintiff's rights. (*Johnson* v. *Underhill*, 52 N. Y. 203; *Campbell* v. *A. Z. Co.*, 122 id. 455.) Plaintiff did not ratify, consent or agree to a departure from or modification of the original contract. (*Smith* v. *Kidd*, 68 N. Y. 130, 142; *King* v. *Mackellar*, 109 id. 215, 223; *Baldwin* v. *Burrows*, 47 id. 199;

Smith v. *Tracy*, 36 id. 79; *Williams* v. *W. U. T. Co.*, 93 id. 162; *Paige* v. *Willett*, 38 N. Y. 28, 31; *Riggs* v. *C. M. Ins. Co.*, 125 id. 7, 11; *Baldwin* v. *Short*, Id. 553, 558; Code Civ. Pro. § 500; *Linton* v. *U. F. Co.*, 124 N. Y. 533; *Swift* v. *S. I. R. T. Co.*, 123 id. 645; *Hart* v. *H. R. B. Co.*, 80 id. 622; *Hawthorne* v. *Hodges*, 28 id. 486; *Brownell* v. *Winne*, 29 id. 400; *Goodsell* v. *W. U. T. Co.*, 109 id. 147; *Outwater* v. *Moore*, 124 id. 66.)

William H. Shepard for respondent. The subscription and prospectus did not confer upon the holder of stock the right to an apartment free of rent. (1 R. S. chap. 18, § 2; *L. O. S. R. R. Co.* v. *Curtiss*, 80 N. Y. 219.) The plaintiff, to succeed in this action, must establish a legal title. Proof of an equitable title is not sufficient to support the action of ejectment. (*Risley* v. *Rice*, 40 Hun, 586; *Peck* v. *Newton*, 46 Barb. 173; *S. F. M. Co.* v. *Belcher*, 49 Cal. 655; *Eccles* v. *Day*, 4 Conn. 96.) The plaintiff being in possession as a mere licensee or tenant at will, could not assign or transfer his possession, and, by underletting the apartment, lost all possession therein, so far as the defendant is concerned, and it had the right to resume possession. (*People* v. *Field*, 1 Lans. 238; *Wright* v. *Moore*, 21 Wend. 233; *Pierce* v. *Tuttle*, 53 Barb. 166; *Rockland* v. *Schanck*, 43 N. Y. 448.) But even if the entry were unlawful, since the defendant has the legal title, it may defend its possession in this action. (*Jackson* v. *Farmer*, 9 Wend. 201.) No error was committed in the exclusion or admission of evidence, and the plaintiff was not prejudiced thereby. (*Olcott* v. *T. R. R. Co.*, 27 N. Y. 546.)

FINCH, J. The decisive inquiry on this appeal is whether the plaintiff was bound by the by-laws of the corporation, and so by the action of the majority of its stockholders.

The "Chelsea" became a corporation and was organized as such under chapter 589 of the Laws of 1881. That act permits any three or more persons to organize themselves into a corporation "for the purpose of purchasing, acquiring, maintaining and improving real estate for residences, homesteads

and apartment houses, to be leased and conducted by the corporation so formed," and authorizes it to distribute its property and the rents, income and proceeds thereof among its members and stockholders "in such manner as shall be determined by its by-laws." Ordinarily, the business of a corporation is conducted by and placed within the control of its board of directors or trustees, but in the present case an important limitation was attached to their authority by the by-laws which were adopted the day following the formal organization of the company. Article 9 provides that "all questions as to the purchasing of land, the character and style of building to be erected thereupon, as to how and to whom and at what rent the several apartments shall be leased, and as to the apportioning and distributing of the said apartments among the stockholders shall be decided by the vote of the majority of the stock, and not otherwise." Authority to decide these questions, which were vital to the success and prosperity of the common enterprise, must necessarily rest somewhere, and the statute authorized the corporation to settle that for itself through the operation of its by-laws, and these conferred the authority not upon the trustees, but upon the majority of the stockholders. Notwithstanding that fact, the board of trustees took it upon themselves to adopt the prospectus which had previously been issued. That contemplated an outlay of five hundred and eighty thousand dollars, one-half of which was to be obtained by mortgage of the property, and the other half by sales of stock. The prospectus dealt wholly in estimates, and these, as is generally the fact, were hopeful and flattering much beyond the realized truth. A subscription for seventy shares, costing thirty-five hundred dollars, it was asserted, would entitle the subscriber to certain apartments on any of the floors without additional rent. But all this was estimate merely, and whoever bought the stock must necessarily take it subject to the authorized control and the emergencies which the actual construction should develop. One of the subscribers was Cruikshank, who acted for Van Brunt, and to the latter, in virtue of his seventy shares, was assigned

the apartment in controversy, now numbered 21, and whose rights afterwards passed to the plaintiff.

But before the latter purchased, great changes in the plan were adopted, which at once made the results outlined by the prospectus utterly impossible. These changes made the building thoroughly, instead of partially, fire-proof, added an additional story, and almost exactly doubled the contemplated expenditure. The plaintiff was present at the stockholders' meeting at which the changes were made, "representing his wife," and favored them all. The by-laws were read at that meeting and in his presence. He, therefore, perfectly understood the situation and knew before he purchased the seventy shares of Van Brunt that the estimates of the prospectus had become illusory by reason of the added expenditure. Nevertheless, he bought the stock and went into possession of the apartments assigned. But he took that possession subject to the action of the majority of the stockholders as provided by the by-laws.

At a stockholders' meeting held in January, 1884, which was after plaintiff's purchase of Van Brunt, but before the transfer of the stock to him upon the books of the corporation, it was unanimously determined, in view of the increased cost of the structure and the added burden of the mortgage debt, to increase the capital stock to five hundred thousand dollars and to charge to the stockholders as rent for their apartments ten per cent upon the par of their stock. The increased capital was distributed *pro rata* without additional cost to the stockholders and the plaintiff, when he took his stock certificate, received the sixty-seven new shares and became and remains the owner of one hundred and thirty-seven instead of seventy shares. He rented the apartment assigned to him for eight hundred and fifty dollars, thus receiving as interest upon his original investment about twenty-four per cent, and utterly refused to pay the rent or accept a lease as tendered. When his tenant vacated the apartment, the corporation resumed possession of it and excluded him from it after having many times demanded the rent and been refused.

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I agree with the trial judge that the plaintiff had no legal title to his apartment, but an equitable right to it upon the reasonable conditions imposed by the majority of the stockholders under the authority of the by-laws. By rejecting those conditions, he lost his right to the apartment assigned, and has no title to it upon which he can recover the possession. The original prospectus was not an element of a completed contract, but a tentative plan, subject by the very law of the corporate organization to such material modifications as the necessities of the enterprise should require and a majority of the associates direct. It is shown that the certificate of stock is only such, and has no connection with any specific apartment. It simply confers upon the holder the rights of a stockholder and those rights are subordinate to the law of the corporate organization. This view was that adopted by the courts below and it seems to us correct.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. MORRIS A. YOUNG, Respondent, *v.* CHARLES STRAIGHT, Clerk of the Village of Wellsburg, Appellant.

By the charter of the village of Wellsburg (Chap. 291, Laws of 1870, as amended by chap. 68, Laws of 1887, and chap. 172, Laws of 1888), every person elected or appointed to office is required to take and file with the clerk of the village an oath of office. By an ordinance of the board of trustees authority was conferred upon said clerk to administer such oath. A majority of the inspectors of election signed a statement as to the results of an annual election for village officers, which was filed with the clerk; this showed that there were one hundred and thirty-six ballots cast for president, of which sixty-six were cast for the relator, "Morris A. Young," one for "Morris Young," one for "M. A. Young," one was defective, and one blank. Defendant, the village clerk, when applied to for that purpose, refused to administer the oath of office to the relator, claiming that he was not legally elected. *Held*, that a mandamus was properly granted, requiring defendant to perform this duty; that he was not called upon to decide as to the legality of the applicant's election; but, in his ministerial capacity, was obliged to administer the oath,

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if *prima facie* it appeared, as it did in this case, that the individual desiring to be sworn had the greatest number of votes, at least if he was not known to be ineligible; also, that a certificate from the inspectors as to the relator's election was not requisite.

As to whether the clerk might refuse to administer and file such oath, if the applicant was known to be ineligible, *quære.*

(Submitted October 19, 1891; decided October 27, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made July 7, 1891, which affirmed an order directing a peremptory writ of mandamus to issue to defendant, Charles Straight, clerk of the village of Wellsburg, N. Y., commanding him forthwith and immediately to administer to and file the oath of office of the relator as president of said village.

The facts, so far as material, are stated in the opinion.

Frederick Collin for appellant. The relator was not entitled to a writ of peremptory mandamus. (High's Ext. Leg. Rem. §§ 9, 10, 32; *People ex rel.* v. *Bd. Suprs.*, 64 N. Y. 600; *People ex rel.* v. *Wendall*, 71 id. 171; *People ex rel.* v. *Hoyt*, 66 id. 606; *People ex rel.* v. *McLean*, 11 N. Y. Supp. 851; *Johnson* v. *Lucas*, 30 Tenn. 305; *Lucas* v. *Mayham*, 79 Mass. 83; *People ex rel.* v. *Schiellim*, 95 N. Y. 124; *People* v. *Bd. Suprs.*, 12 Barb. 217; *People* v. *Myers*, 50 Hun, 479; *People* v. *R., W. & O. R. R. Co.*, 103 N. Y. 95; *People ex rel.* v. *Becker*, 3 N. Y. S. R. 202.) Inasmuch as the peremptory writ was granted the court will take as true all the statements of fact of the opposing affidavits. (*People* v. *R., W. & O. R. R. Co.*, 103 N. Y. 95; *People ex rel.* v. *Fairman*, 91 id. 385; *People ex rel.* v. *Cromwell*, 102 id. 477; Code Civ. Pro. § 2070; *Milliken* v. *W. U. T. Co.*, 110 N. Y. 403.) The defendant is not obliged to administer the oath, even if the relator were legally elected. (*People* v. *N. Y., L. E. & W. R. R. Co.*, 104 N. Y. 58.) There was not and has not been at any time, before defendant, any evidence that the relator was elected. (Laws of 1870, chap. 291, §§ 16, 19, 20; *People ex rel.* v. *Bd. Canvassers*, 126 N. Y. 392; *People ex*

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rel. v. *Seaman*, 5 Den. 409; *People* v. *Cook*, 8 N. Y. 67; *People ex rel.* v. *Ferguson*, 8 Cow. 102; *Kortz* v. *Bd. Canvassers*, 12 Abb. [N. C.] 84; *Clark* v. *Bd. Examiners*, 126 Mass. 282; *People ex rel.* v. *Dikeman*, 7 How. Pr. 124; *Johnson* v. *Lucas*, 30 Tenn. 305.) The title to an office cannot be tested by either the peremptory or alternative writ of mandamus. (*People ex rel.* v. *Parker*, 117 N. Y. 86, 286; *In re Gardner*, 68 id. 467; *Leeds* v. *Atlantic City*, 52 N. J. L. 332; *People ex rel.* v. *Ferris*, 76 N. Y. 326; *People ex rel.* v. *Suprs.*, 58 How. Pr. 141; *People ex rel.* v. *N. Y. I. Asylum*, 7 N. Y. S. R. 277.) It is only where there is a declaration or certificate of the inspectors of election showing that the claimant, upon the face of the facts, is entitled to the office, or, in other words, where nothing stands between him and his right to take the official seat, that the writ of mandamus will compel the administering of the oath. (*Ex parte Heath*, 3 Hill, 42; *Ashley's Case*, 4 Abb. Pr. 35.)

W. E. Knapp for respondent. The appellant did not raise a question of fact. (Laws of 1870, § 5; Laws of 1874, chap. 628; *People ex rel.* v. *McKinney*, 52 N. Y. 347; *Kessel* v. *Zeiser*, 102 id. 114; *People* v. *Collins*, 7 Johns. 549, 551, 552, 553, 554; *People ex rel.* v. *Assessors, etc.*, 52 How. Pr. 140; *In re Williamsburg*, 1 Barb. 34; *People ex rel.* v. *Jennings*, 6 Cow. 579; *Ackley's Case*, 4 Abb. Pr. 35; *People ex rel.* v. *Wilson*, 119 N. Y. 517; *People ex rel.* v. *Board, etc.*, 103 id. 541–543; *West* v. *A. E. Bank*, 44 Barb. 179; *Wood* v. *Whiting*, 21 id. 190–198; *Marsden* v. *Sweet*, 66 N. Y. 206–210; *Powers* v. *R., W. & O. R. R. Co.*, 3 Hun, 285; *Averill* v. *Day*, 26 id. 319; Bailey's Code Pleadings, 234.) The relator was entitled to have the oath of office administered to him for the reason that the return presumptively showed his election to the office, and the clerk, being a ministerial officer, had no right to decide otherwise. (*People ex rel.* v. *Dean*, 3 Wend. 438; *People ex rel.* v. *Collins*, 7 Johns. 594–553; *Ex Parte Heath*, 3 Hill, 43; *Wilcox* v. *Smith*, 5 Wend. 233; *Ackley's Case*, 4 Abb. Pr. 36; *People* v. *Hawkins*, 46

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N. Y. 10; *People* v. *Bd. Suprs.*, 12 Barb. 217; *Nichols* v. *McLean*, 101 N. Y. 327.) The appellant having failed to object to the Special Term adjudication upon all the questions raised, whether of law or of fact, on the affidavits, is deemed to have consented to it so adjudicated. (*People ex rel.* v. *City of New York*, 39 Barb. 522–538; *People* v. *Throop*, 12 Wend. 187.) A vote cast for "Morris Young" must be counted for "Morris A. Young," because the law knows only one Christian name. (*People* v. *Cook*, 14 Barb. 261–307; *Recks* v. *Talmadge*, 5 Johns. 84; *Newton* v. *Porter*, 69 N. Y. 1; *Franklin* v. *Talmadge*, 5 Johns. 84; *People* v. *Cook*, 8 N. Y. 67; *People* v. *Ferguson*, 8 Cow. 102; *People* v. *Seaman*, 5 Den. 409; *People* v. *Pease*, 27 N. Y. 85; *People* v. *Smith*, 45 id. 79.)

Per Curiam. The appellant has refused to administer the oath of office to the respondent and raises the question of the right to compel him to administer it. The theory of his case, apparently, is that in some way his administration of the oath of office would amount to a decision as to the respondent's title to the office, and, as he denied that there was any legal election of the relator, he could not be compelled to take and file his oath. But that is not so. By the provisions of the act, under which this village was incorporated, every person elected or appointed to office is required to take and file with the clerk of the village an oath of office. By an ordinance of the board of trustees of the village, authority was conferred upon the clerk to administer such oath of office. If applied to for that purpose, he was not called upon to decide as to the legality of the applicant's election or appointment; but, in his ministerial capacity, he was obliged to administer the oath of office, if *prima facie* it appeared that the individual desiring to be sworn had the greatest number of votes at the charter election. Perhaps, too, the clerk might refuse if the person was known to be ineligible. At this election, there were one hundred and thirty-six ballots cast, of which sixty-six were for the opposing candidate, O'Brien; sixty-six were for "Morris A. Young;" one was for "Morris Young," and one was for "M. A. Young;"

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one was defective, and one was blank. If the sixty-eight ballots bearing the name of Young were legal ballots for the relator Morris A. Young, then he had received a majority of the votes for the office. Whether the votes given for "Morris Young" and for "M. A. Young" should be counted for the relator was not a question for the clerk to pass upon, when Young applied to him to administer the oath of office. It was sufficient that the returns presumptively showed the relator's election. Thereupon he was entitled to have the proper oath of office administered to him, in order that he might be in a condition to assert his legal rights.

Upon the question of the propriety of granting the writ of peremptory mandamus, it is sufficient to say that, as by the paper in the clerk's possession, signed by a majority of the inspectors of election, a return was made showing that a majority of the ballots were for the candidate named Young, it presumptively showed his election and it was the duty of the clerk to administer the oath which the statute requires every officer to take and file. It is not material that the inspectors did not make a certificate as to Young's election to the office. They did sign a paper showing the whole number of votes given for each person voted for, and that, as between the candidates O'Brien and Young, a majority were for Young. That paper the clerk had possession of. There was no denial of material facts alleged or established by the relator as to the results of the election appearing from the paper filed with the clerk, or concerning his identity, and hence the issuance of the writ of mandamus to compel the clerk to do his duty was perfectly proper.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

Statement of case.

128 550
136 173
128 550
140 419

In the Matter of the Application of the Directors of the CHRISTIAN JENSEN COMPANY (Limited) for a Voluntary Dissolution.

Upon an application for the voluntary dissolution of a corporation, under the provisions of the Code of Civil Procedure (§§ 2419 *et seq.*) the court acquires jurisdiction upon a petition properly presented; by its appointment of a receiver the property of the corporation comes into its possession, and it has power to preserve and protect it; for this purpose it may prohibit any interference therewith in any action thereafter instituted.

Even if the order granted upon the petition is in some respects irregular, imperfect and informal, it is not, because of this, a nullity.

While a receiver so appointed may not interfere with the property until he has filed his bond, when this is done his title relates back to the date of his appointment.

Even as to property of which the corporation had wrongfully obtained possession before the appointment of a receiver, after it has passed into his possession the owner may not, without first obtaining leave of the court, replevy it in an action against the receiver.

An application under said provision, prayed for a dissolution of the corporation; the order granted thereon was entitled "In the Matter of the Application of the Directors" of the corporation for a voluntary dissolution. The order recited that the corporation was insolvent, and required all persons interested to show cause why the prayer of the petitioner should not be granted. *Held*, that this was substantially a requirement to show cause "why the corporation should not be dissolved," and so was sufficient in this particular.

The order did not direct its publication and did not specify the newspapers in which it was to be published, as required. (Code Civ. Pro. § 2424.) *Held*, that while this was a defect, it was not one which rendered the appointment of the receiver a nullity; also, that the court having jurisdiction of the proceedings had authority to make an order *nunc pro tunc*, correcting the defect.

(Argued October 19, 1891; decided October 27, 1891.)

APPEAL from parts of an order of the General Term of the Superior Court of the city of New York, made July 2, 1891, which affirmed parts of an order of Special Term set forth in the opinion.

The nature of the proceedings and the facts, so far as material, and the portions of the Special Term order in question are stated in the opinion.

Opinion of the Court, per EARL, J.

John Fennel for appellants. The proceeding is a statutory one, and unless the statute is fully complied with, there is no jurisdiction. (29 Hun, 449; Code Civ. Pro. § 2433; *Sharp* v. *Spier*, 4 Hill, 76; *In re Hall*, 72 N. Y. 184; *Bloom* v. *Hendrick*, 1 Hill, 130; *In re Dubois*, 15 How. Pr. 7; *In re Valentine*, 72 N. Y. 184; *Stilwell* v. *Swartout*, 81 id. 109; *Brown* v. *Mayor, etc.*, 3 Hun, 686; *People ex rel.* v. *Bd. of Police*, 6 Abb. Pr. 164; *Sibley* v. *Waffle*, 16 N. Y. 185; *Bango* v. *McIntosh*, 23 Barb. 599.) Where there is a failure to comply with the statute, it is as fatal to a proceeding in a Superior Court as to a proceeding in an inferior court. (*Bloom* v. *Burdick*, 1 Hill, 139; *Chamberlain* v. *R., S. P. V. Co.*, 7 Hun, 557; *Bangs* v. *McIntosh*, 23 Barb. 598, 601.) There was no jurisdiction to amend the order. (*Cornin* v. *Merritt*, 3 Barb. 346; *In re Valentine*, 72 N. Y. 84; *Battel* v. *Torrey*, 65 id. 295; *People* v. *Hulbert*, 46 id. 110; *Stillwell* v. *Swarthout*, 81 id. 109.) The order of March 10, 1891, was also void because it did not provide for the service upon the stockholders and creditors. (Code Civ. Pro. § 2425.) The title of the receiver was not vested until he filed his official bond. (Code Civ. Pro. §§ 715, 1788, 2423; *Kincaid* v. *Dwinnele*, 59 N. Y. 548; *In re Stonebridge*, 57 Hun, 441.) The court had no power to order that the goods taken on replevin be delivered to the receiver. (*G. S. Bank* v. *Habel*, 80 N. Y. 273; Code Civ. Pro. § 2433.)

John C. Coleman for respondent.

EARL, J. On the 10th day of March, 1891, the directors of the Christian Jensen Company (Limited) presented a petition to the Superior Court of the city of New York, praying for a voluntary dissolution of the corporation. As the petition is not contained in the record, we must assume that it was proper in form and substance. In fact, no objection is made that it did not comply with the provisions of the Code relating to the voluntary dissolution of corporations. (§§ 2419 *et seq.*) Upon the presentation of the petition, the court made an order appointing Isidor Grayhead temporary receiver of all

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the property and assets of the corporation, as authorized by section 2423 of the Code, which also provided that all "person or persons whomsoever, whether creditors of the said Jensen Company (Limited), or otherwise, are hereby enjoined and restrained from bringing or continuing any action against the said corporation for the recovery of any moneys due said creditors and until the further order of this court in the premises." The next day the receiver filed his bond and became qualified to act; and he took actual possession of the property of the corporation on the twelfth day of March. The order of March tenth was served on the appellants, who composed the firm of Charles F. Wahlig's Sons, on March twelfth, but no copy of the petition was served with the order. On the twelfth of March, the attorney for the petitioners, without notice to the appellants, made a motion that the order of March tenth be amended *nunc pro tunc*, in certain particulars, and that motion was granted. On the eleventh of March, the appellants commenced an action in one of the District Courts in the city of New York against the corporation and in that action a writ of replevin was issued to one of the city marshals who on the same day replevied from the corporation certain property in its possession; and on the same day they commenced an action in the Court of Common Pleas to recover a money judgment; and in that action a warrant of attachment was issued to the sheriff of the city and county of New York, and on the same day he attached certain property of the corporation. Thereafter, the receiver made a motion at a Special Term of the Superior Court to restrain the prosecution of the suits thus commenced by the appellants, and after hearing counsel for the parties, the court made an order granting the motion and permanently restraining the appellants from taking any further proceedings in the actions brought by them. From that order, they appealed to the General Term, and then to this court.

They now contend that the first order made by the Superior Court, on the tenth of March, did not require, as provided in section 2423 of the Code, all persons interested in the corpora-

tion to show cause "why the corporation should not be dissolved," and hence that the order was a nullity. It was the presentation of the petition that gave the court jurisdiction, and even if its order was in some respects irregular, imperfect and informal, it was not a nullity. It was effectual to appoint a receiver, and the moment he was appointed he became an officer of the court, and from that time the property of the corporation was in *custodia legis*, and the court had the power to preserve and protect it. While the receiver could not interfere with the property of the corporation until he filed his bond, yet after he filed his bond, his title related back to the date of his appointment; and so it has frequently been held. (*Rutter* v. *Tallis*, 5 Sandford's Superior Court Reports, 610; *Storm* v. *Waddell*, 2 Sandford's Chy. Reports, 544; *Wilson* v. *Allen*, 6 Barb. 542; *In the Matter of Berry*, 26 id. 55; *Deming* v. *New York Marble Company*, 12 Abb. Pr. Reports, 66.)

It, therefore, follows that when this property was attached and replevied on the eleventh day of March, the title was in the receiver, and the property was in the custody of the law, and the court had power to prevent any interference with it in any action and its dissipation and removal by writ of replevin or attachment.

The court had express authority, under section 2423 of the Code, to restrain proceedings in the action in which the attachment was issued. As to the replevin action, if the corporation had been a naked wrong-doer in obtaining or retaining the possession of the appellants' property, and they had been the absolute owners of the property, they could have replevied it from the wrong-doer before it came into the actual possession of the receiver, and thus into the custody of the court. Even then, after the property had passed with the other property into the actual possession of the receiver, it could not, without leave of the court first obtained, have been replevied from him in an action against him. The only remedy then of the appellants would have been by an action commenced with the leave of the court, or by petition to the court. (*Noe* v. *Gibson*, 7 Paige, 513; *Riggs* v. *Whitney*, 15 Abb. Pr. 388; *Chautauqua County Bank* v. *Risley*, 19 N. Y. 369; *Barton* v. *Barbour*,

104 U. S. 126; *Evelyn* v. *Lewis*, 3 Hare, 472; *Ex parte Cochrane*, Law Reports [20 Eq. Cas.] 282; High on Receivers, § 143.) But here there was no proof showing what the relations of the corporation and the appellants to the property replevied were. The appellants may have been mortgagees or pledgees, or the corporation may have purchased or obtained the property by fraud, which the appellants could disaffirm. In either of these cases the corporation had an interest in the property and in its final disposition, and it should remain in the custody of the court, to be disposed of in this proceeding under the rules and practice applicable to such cases.

As to the alleged defects in the order of March tenth, it did, in substance, require all persons interested to show cause "why the corporation should not be dissolved." The title of the order, "In the Matter of the Application of the Directors of the Christian Jensen Company (Limited) for a Voluntary Dissolution," showed that the proceeding was for a voluntary dissolution of the corporation, and the order recited that the corporation was insolvent, and it required all persons to show cause why the prayer of the petition should not be granted. Under the provisions of the Code, the only prayer to be contained in the petition is for a dissolution of the corporation, and we think the order in substance required the persons interested to show cause why such a prayer should not be granted.

It is also objected that the order is defective for not complying with the provisions of section 2424 of the Code, because it did not require the order to be published, and did not specify the newspapers in which it was to be published. It is quite true that that is a defect which the parties could have taken advantage of by motion, or in some other way, but it was not a defect which rendered the appointment of the receiver a nullity. Furthermore, the court having jurisdiction of the proceeding, could make an order as it did, *nunc pro tunc*, correcting the formal defects in its order. Such an order was in furtherance of justice, did not interfere with any rights which had accrued, did no harm to any one, and the court was perfectly competent to make it. It is quite true

Statement of case.

that if the order made on the tenth had been an absolute nullity the court would have been without power to interfere with the seizure of the property under the attachment and writ of replevin by thereafter making an order *nunc pro tunc* which then for the first time became effectual.

Our conclusion, therefore, is that by the order made on the tenth of March, upon a petition properly presented, the court acquired jurisdiction of the proceeding; that its appointment of the receiver was valid; that the property thus came into its possession, and that it had a right to prohibit an interference therewith in any action thereafter instituted.

The order should be affirmed, with costs.

All concur.

Order affirmed.

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128 555
148 291

Theodore McKuskie, Respondent, *v.* John Hendrickson, Appellant.

While the courts may interpret doubtful or obscure phrases and imperfect language in a statute so as to give effect to the presumed intent of the legislature and to carry out what appears to be the general policy of the act, they may not import therein a new provision to cure a *casus omissus*, however just and desirable it may be to supply the omitted provision.

As costs are regulated by statue, a party is not entitled to them unless he can point to some statute giving them in such a case.

Plaintiff recovered judgment against defendant in a Justice's Court for thirty dollars and costs. Defendant appealed to the County Court, demanding a new trial, and served an offer allowing judgment against him for five dollars. Plaintiff did not accept, and made no offer himself. On trial in the County Court a verdict was rendered for plaintiff for thirty-five dollars. *Held*, that under the provisions of the Code of Civil Procedure regulating costs upon such appeals (§ 3070, as amended by chap. 522, Laws of 1885), plaintiff was not entitled to costs.

It seems the only way a plaintiff can secure costs in such a case is by making an offer to take judgment for a sum specified, and if defendant refuses to accept he is liable to costs, unless the recovery is more favorable to him than the offer.

(Submitted October 12, 1891; decided October 27, 1891.)

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, made December 8,

1890, which reversed an order of the County Court of Queens county, setting aside the taxation of costs herein and reducing the judgment in favor of plaintiff by deducting therefrom the costs included therein.

The plaintiff recovered a judgment in a Justices Court for thirty dollars damages, besides costs. From that judgment the defendant appealed to the County Court, demanding a new trial, and within fifteen days after the service of the notice of appeal caused a written offer to be served upon the plaintiff allowing judgment to be entered against him in the County Court for five dollars. The plaintiff did not accept the offer, and made no offer to the defendant. A new trial was had in the County Court and the plaintiff recovered a verdict for thirty-five dollars. The plaintiff's attorney then made application to the county clerk for the taxation of his costs, and the clerk, against the objection of the defendant, adjusted his costs at $80.25, and judgment was entered and docketed in favor of the plaintiff for $115.25 damages and costs. Thereafter the defendant made a motion in the County Court to set aside and vacate the adjustment of costs made by the clerk, and that motion was granted, the court holding that the plaintiff was not entitled to costs against the defendant, but was entitled to judgment for the damages only. From the order of the County Court the plaintiff appealed to the General Term, where it was held that the County Court had erred, and its order was reversed, and thus the allowance of costs to the plaintiff was confirmed. By leave of the General Term the defendant appealed from its order to this court.

Harrison S. Moore for appellant.

Henry A. Montfort for respondent. The respondent was entitled to costs. (Code Civ. Pro. §§ 3068, 3070, 3073; Laws of 1885, chap. 522; Code Pro. § 371; *Hollenbeck* v. *Knapp*, 12 Hun, 207.)

Earl, J. Costs are regulated by statute, and unless the plaintiff can point to some statute giving him costs in a case

like this he is not entitled to any. He is not entitled to costs by virtue of any general provision contained in section 3228 of the Code, because he did not recover as much as fifty dollars. The only section of the Code relating to costs in a case like this is 3070, and that provides as follows: "Upon an appeal provided for in this article, from a judgment for a sum of money only, either party may within fifteen days after service of the notice of appeal, serve upon the adverse party, or upon his attorney, a written offer to allow judgment to be rendered in the appellate court, in favor of either party, for a specified sum. If the offer is not accepted, it cannot be proved upon the trial. If the party, within ten days after service of the offer upon him, serves upon the party making the same, or upon his attorney, written notice that he accepts the offer, he must file it with an affidavit of service of the notice of acceptance, with the clerk of the appellate court, who thereupon must enter judgment accordingly. Where an offer is made as above provided, the party refusing to accept the same shall be liable for costs of the appeal, unless the recovery shall be more favorable to him than the sum offered. If neither party make an offer as provided herein, the party in whose favor the verdict, report or decision in the appellate court is given, shall be entitled to recover his costs upon the appeal."

The plaintiff refused to accept defendant's offer, and as the recovery was more favorable to him than the sum offered, he was not liable to pay costs to the defendant. But there is no provision in the Code giving the plaintiff costs in such a case against the defendant where the recovery is for less than $50, and no language is used indicating that such was the legislative intention. The only way in which plaintiff can secure his right to costs in such a case as this is by making an offer to take judgment for a sum specified, and then if the defendant refuses to accept the offer he will be liable to costs unless the recovery is more favorable to him than the offer. Here the plaintiff could have offered to take the judgment in the County Court for thirty dollars, or any other sum not exceeding thirty-five dollars, and could thus have secured his right to costs. It

may be the legislature intended that this practice should be pursued. Previous legislation upon the subject of costs in such a case as this has no tendency whatever to justify the plaintiff's contention. There was a special provision in section 371 of the old Code, that upon an appeal to the County Court, where a new trial was had, "the respondent shall be entitled to recover costs where the appellant is not." In 1885 section 3070 of the present Code was amended so as to read as it now is. Prior to that amendment it provided as follows: "If the offer is made and not accepted, and the verdict, report or decision of the appellate court is more favorable to the appellant than the amount of the offer, the appellant is entitled to recover costs upon the appeal; otherwise the respondent is entitled to recover costs." Here again was a special provision giving the respondent costs. The special provisions found in the old and the present Code giving costs to the respondent are not contained in the Code as it now is. The provision was dropped out in 1885, and we cannot say that the legislature intended that it should be retained. As the Code now is, each party can secure his costs, or secure himself against costs, by making the offer provided for in the section.

In construing a statute the legislative intention must be sought in the language used therein contained with such helps as the canons of interpretation allow. But new language, or, as in this case, an entirely new provision, cannot be imported into a statute giving it a meaning not otherwise found therein. While the courts may interpret doubtful or obscure phrases and imperfect language in a statute so as to give effect to the presumed intention of the legislature, and to carry out what appears to be the general policy of the law, they cannot, by construction, cure a *casus omissus*, however just and desirable it may be, to supply the omitted provision.

Our conclusion, therefore, is that the order of the General Term should be reversed, and the order of the County Court affirmed, with costs to the defendant of the appeal to the General Term and to this court.

All concur, except Andrews, J., not voting.

Order reversed.

Statement of case.

JAMES P. KERNOCHAN, Individually and as Executor, etc., et al., Respondents, *v.* THE NEW YORK ELEVATED RAILROAD COMPANY et al., Appellants.

The construction of an elevated railroad in a city street, without having acquired the easements therein of an abutting owner, if it diminishes the rental value of his property, is an injury to the inheritance, and although the owner, after such construction, has leased his premises, he may maintain, and has the exclusive right to maintain, an action for the damages sustained, *i. e.*, for the diminution in the rental value caused by the construction and operation of the railroad during the period in which the premises were in the actual occupation of tenants under the lease.

Upon the death of such lessor, intestate, or having devised the land, the right to damages accruing after his death goes with the title to his heirs or devisee, not to his personal representatives.

It seems that where a lease was executed prior to the construction of the road, the lessee is the party entitled to maintain the action.

Where, upon the trial of an action by an abutting owner to recover such damages, a question calling for the opinion of an expert witness called by plaintiff as to what would have been the value of the premises if the road had not been constructed, a general objection of incompetency was interposed, which was overruled, *held*, no error; that the objection did not raise the point that the opinion of the witness was inadmissible; that it was aimed not at the mode of proof, but rather at the competency of the fact sought to be proved.

(Argued October 9, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York made February 13, 1891, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial without a jury.

This action was brought to recover damages, arising from the interference with plaintiffs' easement in a street in New York city, by the construction and maintenance therein of an elevated railroad by defendant. Upon the trial a witness called by plaintiff, who testified that his business was that of appraiser of real estate, after testifying in regard to the premises, their rental and value before and after the building of defendant's road, was asked: "What, in your opinion, would be the value of that property to-day if there were no such road there

as you have described?" Defendants' counsel objected to this evidence on the ground that it was incompetent. The court overruled the objection and an exception was taken and the witness answered.

The other material facts are stated in the opinion.

Samuel Blythe Rogers for appellants. It was error to award damages for the period covered by the lease which was outstanding when plaintiffs' title was acquired. (*Griswold* v. *M. E. R. Co.*, 122 N. Y. 102; *Uline* v. *N. Y. C. R. R. Co.*, 101 id. 98, 126; *Pond* v. *M. E. R. Co.*, 112 id. 186, 188; *Tallman* v. *M. E. R. Co.*, 121 id. 119, 124; *Dean* v. *M. E. R. Co.*, 115 id. 540; *Post* v. *M. E. R. Co.*, 125 id. 697; *Filer* v. *N. Y. C. R. R. Co.*, 49 id. 44.) It was error to permit witnesses for plaintiff to state what, in their opinion, would have been the fee and rental values of this property had the railway not been built. (*McGean* v. *M. R. Co.*, 117 N. Y. 219; *Avery* v. *N. Y. C. & H. R. R. R. Co.*, 121 id. 31.) The objections were sufficiently specific. (*Avery* v. *N. Y. C. & H. R. R. R. Co.*, 121 N. Y. 31.) The admission of incompetent evidence is presumptively injurious to the appellants. It cannot be disregarded unless shown conclusively to be innocuous. It is not enough that its exclusion would probably not have affected the result. (*Coleman* v. *People*, 58 N. Y. 555, 562; *Starbird* v. *Barrows*, 43 id. 200; *Anderson* v. *R., etc., R. Co.*, 53 id. 335; *People* v. *Fernandez*, 35 id. 59; *Foote* v. *Beecher*, 78 id. 155, 157; *Williams* v. *Fitch*, 18 id. 546; *Carroll* v. *Diemel*, 95 id. 252, 256; *Holcomb* v. *Holcomb*, 95 id. 316, 329.)

G. Willett VanNest for respondents. There was no error in the admission of evidence as to the values the property would have were there no railroad. (*McGean* v. *M. R. Co.*, 117 N. Y. 222; *Crawford* v. *M. E. R. Co.*, 120 id. 624; *Adams* v. *People*, 63 id. 621; *Crosby* v. *Day*, 81 id. 242; *Ward* v. *Kilpatrick*, 85 id. 413, 416; *Honsee* v. *Hammond*, 39 Barb. 89; *Holcomb* v. *Holcomb*, 95 N. Y. 324; *Reed* v. *McConnell*, 101 id. 270; *Avery* v. *N. Y. C. & H. R. R. R. Co.*,

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121 id. 41; *Van Wycklen* v. *City of Brooklyn*, 118 id. 428, 429; *Mayor, etc.*, v. *Secord*, 102 id. 582; *Carter* v. *N. Y. E. R. Co.*, 25 J. & S. 462; *Eno* v. *M. E. R. Co.*, 24 id. 213; *N. Y. N. E. Bank* v. *M. E. R. Co.*, 21 id. 511; *Lawrance* v. *M. E. R. Co.*, 12 N. Y. Supp. 546; Code Civ. Pro. § 1003; *Dunscomb* v. *Hollister*, 49 Hun, 352; *Joy* v. *Hopkins*, 5 Den. 84; *Rochester* v. *Budlong*, 10 How. Pr. 289; *Hine* v. *N. Y. E. R. Co.*, 36 Hun, 293; *In re City of Rochester*, 40 id. 588; *Reed* v. *R., W. & O. R. R. Co.*, 48 id. 213; *Teerpening* v. *C. E. Nat. Bank*, 108 id. 660; Lewis on Em. Domain, 436; 119 N. Y. 122.) The plaintiffs were entitled to recover for loss of rents from November, 1886, to May, 1887. (*Kane* v. *N. Y. E. R. Co.*, 34 N. Y. S. R. 876; *Hamilton* v. *M. R. Co.*, 25 J. & S. 491; *Mortimer* v. *M. R. Co.*, Id. 509; *Pollit* v. *Lay*, 58 Barb. 20; *Lambert* v. *Hoke*, 14 Johns. 383; 1 Chitty on Pl. 157; *Harr* v. *Jackson*, 11 Mass. 519; *Jessen* v. *Gifford*, 4 Burr. 2141; *Bell* v. *Midland*, 10 C. B. [N. S.] 287; *Story* v. *N. Y. E. R. Co.*, 90 N. Y. 145; *Hills* v. *Miller*, 3 Paige, 254; *Child* v. *Chappell*, 9 N. Y. 246; *Taylor* v. *Hopper*, 62 id. 600; *Arnold* v. *N. Y. C. R. R. Co.*, 55 id. 662; *Glover* v. *Manhattan*, 19 J. & S. 1, 3; *Broiestadt* v. *S. S. R. R. Co.*, 55 N. Y. 220; *Corning* v. *T. I. & N. Co.*, 40 id. 191; *Campbell* v. *Seaman*, 63 id. 568; *Griswold* v. *M. E. R. Co.*, 122 id. 102, 106; *Shepard* v. *M. E. R. Co.*, 117 id. 442; *Mitchell* v. *M. E. R. Co.*, 56 Hun, 543; *Werfelman* v. *M. E. R. Co.*, 32 N. Y. S. R. 682; *Doyle* v. *Lord*, 64 N. Y. 361; *James* v. *Plant*, 4 Ad. & El. 749; *Wheelock* v. *Noonan*, 108 N. Y. 578; *Rochester* v. *N. Y., L. E. & W. R. R. Co.*, 110 id. 128.) There was no defect of parties. (*Campbell* v. *Beamart*, 91 N. Y. 464; *Roseboom* v. *Roseboom*, 81 id. 356; *Freeman* v. *Coit*, 96 id. 66, 68.) The court properly refused to find defendants' proposed conclusion of law, viz., that the plaintiffs were barred by acquiescence from maintaining the action. (*Williams* v. *N. Y. C. & H. R. R. R. Co.*, 16 N. Y. 97; *Tallman* v. *M. E. R. Co.*, 121 id. 23; *Hentz* v. *L. I. R. R. Co.*, 13 Barb. 655; *Ramsden* v. *Dyson*, L. R. [1 H. L.] 129; *Murdock* v.

Prospect, 73 N. Y. 579; *McMurray* v. *McMurray*, 66 id. 175; *Fullwood* v. *Fullwood*, L. R. [9 Ch. Div.] 178; *McLean* v. *McCarthy*, 96 U. S. 258.) The rule of damages as alternative to the injunction is the difference between the present fee value of the premises and the value they would have were no elevated road maintained and operated in front thereof. (*Lawrance* v. *M. E. R. Co.*, 125 N. Y. 562; *Drucker* v. *M. E. R. Co.*, 106 id. 157; 1 Sedg. on Dam. [7th ed.] 282; *Glacius* v. *Black*, 50 N. Y. 147; *Dolan* v. *Merritt*, 18 Hun, 28.) There was no ground shown for delaying the trial. (*Solis* v. *Woodin*, 8 How. Pr. 349; *Perry* v. *Dickerson*, 85 N. Y. 350; *White* v. *Mosby*, 8 Pick. 356; *Dawley* v. *Brown*, 79 N. Y. 399; *Stowell* v. *Chamberlain*, 60 id. 276.) The court should grant an allowance additional to costs of ten per cent. (*Abendroth* v. *N. Y. E. R. Co.*, 122 N. Y. 1; 108 id. 660.)

ANDREWS, J. This case and several others now awaiting decision present the question whether the owner of premises in the city of New York, who, after the construction of the elevated railroad in the street upon which the premises abutted, leased them for a term of years, can maintain an action for damages for the impairment of easements in the street appurtenant to his premises, by the existence and maintenance of the road, suffered during the period in which the premises were in the actual occupation of tenants under the lease, or whether the right of action is in the lessee.

The case presents the further question whether, upon the death of the lessor, intestate, the right to damages accruing from his death to the termination of the lease is vested in his administrators or belongs to his heirs, who succeeded to his title to the land.

There is a further question of evidence to which reference will be made.

The question as to the respective rights of lessor and lessee under the circumstances stated has occasioned considerable controversy, and has been argued in several of the cases before us with much ability, and this question will be first considered.

The proposition that the structure of the elevated railroad invades property rights of owners of abutting property is no longer an open question. It is generally, if not universally, true that the structure is located in streets, the fee of which is in the city of New York. The building and operating of the road involves no actual entry upon the lands of the abutting owners, nor any direct injury to corporeal hereditaments. The act of the defendant was not, therefore, a trespass upon land of another, as that injury is defined in the common law. It has been usual in these cases to denominate the injury to abutting owners a trespass. Every invasion of another's rights is such in a general sense, and in this general sense the word has been used as a convenient term to characterize the wrong committed. But the attempt to fasten upon this use an implication that the injury is one to the immediate occupier of the property, viz., to the tenant rather than to the landlord, has no justification.

In the *Story* case the court, in speaking of the right of an abutting owner in the public street, said: "The right thus secured was an incorporeal hereditament; it became at once an appurtenant to the lot and formed an integral part of the estate in it. It follows the estate and constitutes a perpetual incumbrance upon the estate burdened with it. From the moment it attached the lot became the dominant, and the open way or street the servient tenement." The invasion of this incorporeal right by the structure of the elevated road is the gravamen of this and similar actions, and such an injury, although not a trespass upon land, has, throughout the course of common law, been remediable by an action for damages, technically known as an action of trespass on the case.

It is a fundamental proposition that only the party injured by a wrongful act can maintain an action for damages. There may be difficulty in some cases in ascertaining the proper party. The same wrong may occasion injury to several persons, or to separate and distinct interests in the same property. But, he only is entitled to maintain an action who can show that his right has been invaded, and to such

person or persons only, is the wrong-doer bound to make compensation. The owner of real property, so long as he is in possession and has not leased or created any subordinate interest in the land, plainly is the only person injured by the construction and maintenance of the elevated railway. His easements appurtenant to the land are invaded by the structure, constituting an injury to the inheritance, as distinguished from a mere temporary and casual wrong or trespass, not affecting the permanent value or use of the premises. It is true that the wrong is not permanent in the sense that it is irremediable. The structure may be voluntarily removed, or its removal may be compelled on the application of abutting owners, and past damages may be recovered. Until the company shall have acquired, by condemnation proceedings or voluntary cession, the rights of abutting owners, the ordinary legal and equitable remedies are open to them.

It is found as a fact that the defendants proclaim their intention to continue to maintain and operate the railroad, and this is a necessary inference from the situation. The character and purpose of the structure, the corporate powers and obligations of the defendants, the large amount expended in the enterprise, the right of condemnation given by the statutes is convincing evidence, not only that the defendants intend permanently to operate the road, but also that when necessary they will acquire the legal right as against all parties in interest. That under these circumstances the construction and operation of the road before any consummated right has been acquired by the defendants, whereby the owner of abutting property is deprived of the full enjoyment of his property, constitutes an injury to the inheritance, admits, we think, of no doubt.

In the present case the owner of the lot did not retain the full and absolute dominion, but carved out of the fee a term of years; but by so doing he did not divest himself of his inheritance. He still had an inheritance in the land, technically a reversion. His prior absolute and unqualified estate was divided into two estates, one in the termor, the nature and

quality of which is determined by the lease, and the other in himself. In determining whether the lessee acquired by his lease the right to recover damages inflicted upon the property by the road during the term, the situation at the time the lease was executed, the terms of the instrument and the intention of the parties thereto are to be considered. The first and most obvious consideration is that the lease was of the lot, and that when made, the incorporeal and appurtenant easements in the street to the extent that they had been taken or invaded by the elevated railroad, had been practically severed, though by wrong, from the abutting property. The part so taken away was not enjoyed in connection with the premises leased when the lease was executed. But still more material is the fact that the rent reserved in the lease was for the use of the lot in its actual situation. This is not stated in terms, but there can be no other reasonable inference. The road was then in the street and was intended to be a permanent structure. It would be an unnatural and violent presumption that the lessor intended to exact or that the lessee intended to pay rent measured by the value of the use of the premises without the railroad, on the supposition that it would be removed during the term. On the contrary it is undoubtedly true that the rent reserved in leases like this, represents in the minds of the parties the value of the use of the premises incumbered by the railroad. The rent is diminished to the extent of the estimated injury from this cause to the rental value of the premises. In no other view practically could property built upon, and especially business property, be rented at all. Lessees, usually desire leases of such property for a considerable period. The owner could not ordinarily rent from day to day, or week to week. The loss falls upon the lessor, and the continuance of the wrong during the term imposes no pecuniary loss upon the lessee. To hold that the right of action vests in the lessee, or to divide the claim between the owners of the two estates would be contrary to equity and to the presumed intention of the parties.

There are many cases illustrating the principle before

adverted to, that the same wrongful act may affect distinct interests in the same property and give a separate action to the several owners. It was held as long ago as the case of *Bedingfield* v. *Onslow* (3 Lev. 209), that lessee and reversioner may each have an action for an injury resulting from the same wrong, each with respect to his particular estate. A reversioner, however, who by his lease has vested the immediate right of possession of the property in the lessee, sustains no legal injury from mere temporary or causual trespasses on the land. Such wrongs affect the possession merely, and are to be redressed at the suit of the tenant. But the construction of the elevated railroad in the street without having acquired the easements of an abutting owner, if it has diminished the rental value of the property, is a wrong, which, within the authorities, affects the inheritance and gives the revisioner a right of action. He has been compelled to accept smaller compensation for the use of his property than he otherwise would have received, and to that extent has been deprived of its beneficial enjoyment. He has no absolute remedy to compel the removal of the structure, since the right of condemnation can at any time be exercised by the defendants. It has been held that an action lies by a reversioner for a wrongful obstruction of lights of his houses; for a permanent obstruction in the adjacent street; for obstructing a private way appurtenant to his premises; for preventing the access of tenants to a wharf, and for fouling a stream passing his lands upon which dye works had been erected. (*Jesser* v. *Gifford*, 4 Burr. 2141; *Leader* v. *Moxon*, 3 Wils. 461; *Beddingfield* v. *Onslow*, *supra*; *Clowes* v. *Staffordshire Potteries W. W. Co.*, L. R. [8 Ch. App.] 125; *Kidgill* v. *Moor*, 9 C. B. 364; *Bell* v. *Midland Railway Co.*, 10 C. B. [N. S.] 237; See *Mott* v. *Shoolbred*, L. R. [20 Eq.] 22; Addison on Torts, 139.)

It is obvious, we think, within the authorities, that the lessor in a lease, made after the construction of the elevated railroad, of premises abutting thereon, can maintain an action for damages for the loss of rents occasioned thereby. The principle

that diminished rental value is a basis for awarding damages has been frequently recognized in these and similar cases. (*Francis* v. *Schoellkopf*, 53 N. Y. 152; *Tallman Case*, 121 id. 119; *Drucker Case*, 106 id. 157; *Hussner Case*, 114 id. 433; *Lawrence Case*, 126 id. 483.)

It is also a necessary deduction from the circumstances attending the making of ordinary leases of improved property, executed after the construction of the elevated railroad, that the right to recover damages is vested exclusively in the lessor. The circumstances and situation forbid the inference that the parties acted upon the presumption that the road would be removed or abandoned during the term; on the contrary they act upon the presumption that the wrong will be continued, and the rent reserved is fixed upon this assumption. *Baker* v. *Sanderson* (3 Pick. 348) was an action by a reversioner for damages for obstructing the plaintiff's mills, and it was alleged in the declaration that in consequence of the obstruction tenants had threatened to quit and the plaintiff was constrained to make a reduction in rents. The court held that the declaration disclosed a good cause of action and that a recovery by the plaintiff would be a bar to any action by the tenants for the same obstruction. In *Sumner* v. *Tileston* (7 Pick. 198) the plaintiff sued the defendants for damages caused to the plaintiff's mill by the act of the defendant in raising a dam below. During the period for which damages were claimed the mill for a time was occupied jointly by the plaintiff (the owner) and his son, and for another part of the time by the two sons, and in each period the plaintiff reduced the rent on account of the back water. On the trial one of the sons was called as a witness by the plaintiff, and objection was taken to his competency on the ground of interest, which was overruled. On appeal the court held that the plaintiff was entitled to maintain the action, and on the question of the competency of the son as a witness, PARKER, Ch. J., said: "He paid for the use of the mill according to the value of the rent, deducting the obstruction. He can have no action against the defendant for the same reason, viz.: that he is not damnified." We should be very reluct-

ant to make a decision which would expose the defendants to a double action in cases like this, and we are satisfied that the cause of action is entire and is solely vested in the lessor. In a case where the lease was made prior to the construction of the road, different considerations would apply. Under such a lease the lessee is the party who would be entitled to maintain the action, for the same reason that we hold the lessor is entitled in the present case, viz.: that he suffers the injury. Other cases may be suggested, as for example, a ground lease made either before or after the construction of the road, and the tenant makes erections upon the land, or cases where the lease is for such a long term as practically to amount to a fee. We will not anticipate what rule may be held in such cases. It is sufficient to say that they are not controlled by the present decision.

This court in the recent case of *Pappenheim* v. *Metropolitan Elevated Railroad Co.** held that upon an absolute sale in fee of premises on a street through which the elevated railroad is constructed, all right to damages subsequent to the conveyance, by reason of the location and operation of the railway in the street, vests in the grantee. This conclusion seems incontestable. The easements of an abutting owner, invaded, are appurtenant to his premises, and in the nature of things they are indissolubly annexed thereto until extinguished by release or otherwise. They are incapable of a distinct and separate ownership. The owner of a lot cannot reserve them upon a sale, and they must of necessity pass as appurtenant to the premises, and with them passes to the purchaser also the right to any remedy for their invasion. In the case of a lease the easements remain annexed to the estate, not dissevered in law or intention from the inheritance, and whether the general owner alone can assert a claim for damages, or whether both lessor and lessee have an action will depend on the intention and the circumstances. The holding that the vendee acquires the right to all remedies for the future invasion of the easements, accomplishes substantial justice. Both the vendor and

* *Ante*, page 436.

vendee know that the owner of the land, can compel the removal of the road from the street, or as an alternative that the company must institute proceedings for condemnation. Under such circumstances the price obtained or given for the property would not ordinarily be regulated on the assumption that the wrong is to continue unredressed or without compensation, but would naturally represent approximately the value of the land, as if no road had been built, or what is substantially the same thing, the value of the lot in its existing situation, supplemented by the value of the right which passes to the grantee with the conveyance to recover future damages or in case of condemnation, to receive full compensation for the easements taken. In case of leases, neither party expects that the wrong will be promptly righted, and in practice as well as theory the rent reserved represents the impaired value of the use. Both the rule declared in the *Pappenheim* case and in this, operate, as near as may be, to vest the right to compensation in the party who sustains the loss.

As to the second question, we entertain no doubt that on the death of the lessor, intestate or having devised the land, the right to damages from the death of the decedent thereafter suffered, goes with the title to his heirs or devisee, as the case may be. The lessor, in his life-time, never had any claim to recover such damages, and his administrator or executor can have none. It might happen that no future damages would accrue. Upon the road being discontinued and the structure removed, the liability of the company, except for past damages, would cease and the owner who had leased his premises for a term of years at a diminished rent, upon the assumption that the road was to continue, would find himself in the position of having let his premises for what, for the unexpired term, might be an inadequate compensation, but this, we conceive, would entitle him to no remedy against the company. Such damages would not be regarded as flowing from the original wrong. While the wrong continues the true principle is, we think, that as between lessor and heir or devisee, the right to damages accruing subsequent to the devolution of the title of

the lessor, vests in those who have succeeded thereto. They sustain the injury, and not the decedent or his estate. As owners of the reversion, they are entitled to the rents accruing from the decedent's death, and if they are inadequate, and this is attributable to the wrong of the defendant, it is an injury to the reversion, and the reversioners at the time are the persons entitled to maintain the action.

The question of evidence arises on an exception to a question put to an expert witness for the plaintiffs, similar to that recently considered in the *Roberts* case, the allowance of which in that case was held to be error. The objection there was specifically taken that the question involved a fact not provable by opinion. Here there was only a general objection on the ground of incompetency. We have been inclined to hold, in view of the course of trials in these cases against the elevated railway, that although the general objection of incompetency made to a question put to an expert asking his opinion, might be deemed in ordinary cases sufficiently specific, nevertheless to apply that rule in these cases would be unjust, because the objection considered in connection with the course taken on these trials would not fairly lead the court or counsel to suppose that the objection was aimed at the mode of proof, but rather to the competency of the fact sought to be proved. We think we should follow the intimation on the subject in the *McGean* case (117 N. Y. 219), and hold that the objection did not raise the point that the opinion of the witness was inadmissible.

These considerations lead to an affirmance of the judgment.

All concur, except EARL, J., dissenting.

Judgment affirmed.

Statement of case.

CHARLES S. HINE, Respondent, *v.* THE NEW YORK ELEVATED RAILROAD COMPANY, Appellant.

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Where, at the time of the construction of an elevated railroad in a city street upon which plaintiff's premises abutted, said premises were in the possession of tenants occupying under a lease for a term of years, and about the time the railroad corporation began to operate the road plaintiff executed new leases, without having entered into possession, at rentals reduced because of the interference with his easements in the street, *held*, that he was entitled to recover the damages to the inheritance, *i. e.*, the diminution of the rental value.

(Argued October 16, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 13, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Julien T. Davies and *Brainard Tolles* for appellant. The learned trial judge erred in permitting the plaintiff to recover damages for the time during which he was out of possession. (*Post* v. *M. R. Co.*, 125 N. Y. 697; *Young* v. *Dake*, 5 id. 463; *Becar* v. *Flues*, 64 id. 518; *Bank of America* v. *Banks*, 101 U. S. 240; *Luke* v. *Hake*, 5 Daly, 15; *Stoppelcamp* v. *Mangoet*, 42 Cal. 316; *Doyle* v. *Lord*, 64 N. Y. 432; *Pearce* v. *Ferris*, 10 id. 280; *Stamper* v. *Sunderland*, L. R. [3 C. P.] 388; Taylor on Landl. and Ten. § 66; *Newman* v. *M. E. R. Co.*, 118 N. Y. 625; *Kenkele* v. *M. E. R. Co.*, 55 Hun, 400; *Reise* v. *Enos*, 76 Wis. 634; *Tobias* v. *Cohen*, 36 N. Y. 363; *Holmes* v. *Seeley*, 17 Wend. 509; *Campbell* v. *Arnold*, 1 Johns, 511; Waterman on Trespass, §§ 948, 949–967; *Eten* v. *Luyster*, 60 N. Y. 252, 259; *Shannon* v. *Burr*, 1 Hilt. 39; *Henderson* v. *N. Y. C. R. R. Co.*, 78 N. Y. 423; *N. Y. N. E. Bank* v. *N. Y. E. R. Co.*, 108 id. 660; *Pond*

Statement of case.

v. *M. E. R. Co.*, 112 id. 186, 190; *Tallman* v. *M. E. R. Co.*, 121 id. 119; *Mahon* v. *N. Y. C. R. R. Co.*, 24 id. 658; *Plate* v. *N. Y. C. R. R. Co.*, 37 id. 472; *Story* v. *N. Y. E. R. R. Co.*, 90 id. 122; *Uline* v. *N. Y. C. R. R. Co.*, 101 id. 98; *Lahr* v. *M. E. R. Co.*, 104 id. 268; *Drucker* v. *M. R. Co.*, 106 id. 167; *Hussner* v. *B. C. R. Co.*, 114 id. 433; *Ottenot* v. *N. Y., L. & W. R. Co.*, 119 id. 603; *Porter* v. *M. E. R. Co.*, 120 id. 298; *N. Y. E. R. Co.* v. *F. N. Bank*, 135 U. S. 141; Code Civ. Pro. § 1665; *Spies* v. *Damm*, 54 How. Pr. 294; *Avery* v. *N. Y. C. R. R. Co.*, 7 N. Y. Supp. 341; *Thompson* v. *Gibson*, 7 M. & W. 456; *Simpson* v. *Savage*, 1 C. B. [N. S.] 347; *Mumford* v. *O. W. & W. R. Co.*, 1 F & N. 34; *Sherman* v. *F. R. I. W. Co.*, 84 Mass. 524; *Halsey* v. *L. V. R. R. Co.*, 45 N. J. L. 26; *Smith* v. *Phillips*, 8 Phil. 10; *Colrick* v. *Swinburne*, 105 N.Y. 507.)

William H. Arnoux for respondent. The question whether the landlord has a right of action against the defendant for damages sustained by reason of its trespass, while the premises were in the possession of the tenant, is not properly presented in the pleadings and proofs in this action, and, therefore, cannot be considered by the court. (*Post* v. *M. R. Co.*, 125 N. Y. 697; *Francis* v. *Schoellkopf*, 53 id. 152.) Under the common law a landlord had a right of action against one who injured the inheritance, notwithstanding he had leased the premises and was not in the possession thereof. (*Lane* v. *Pigott*, Moore, 915; *Panton* v. *Isham*, 3 Lev. 359; *Griswold* v. *M. E. R. Co.*, 122 N. Y. 102.) A reversioner may maintain an action for an injury done to the inheritance, notwithstanding an intervening estate for years. (4 Kent's Comm. 354; Laws of 1811, chap. 246, § 47; *Van Deusen* v. *Young*, 29 N. Y. 9; 1 R. S. 750, § 8.) The fact that the tenant may have a right of action for the same trespass does not impair the landlord's right of action therefor. (*Francis* v. *Schoellkopf*, 53 N. Y. 152; *Hine* v. *N. Y. E. R. Co.*, 54 Hun, 425; *Tallman* v. *M. E. R. Co.*, 121 N. Y. 119.)

Opinion of the Court, per GRAY, J.

GRAY, J. The action was at law, and was brought to recover damages for injuries sustained by the plaintiff by reason of the maintenance and operation of the defendant's elevated railroad, in front of premises on the Bowery in New York city. The period for which these damages were claimed was from May, 1878, to the commencement of the action, in September, 1880. The defendant's use of the street commenced about the time when new leases of the building were made by the plaintiff and the rentals reserved were less than had been obtained previously. The plaintiff not having been in possession of the premises, the point made by the appellant is that it was error to permit any recovery by him.

This point is claimed to have been raised by several exceptions, but it was not distinctly presented, nor raised during the trial, nor until, upon the submission of the case to the jury, the court was requested to rule that if the jury should find that the premises were in the possession of tenants, at any or all times during the period subsequent to the construction of the railroad and prior to the commencement of the action, then they must award no damages for such period.

Upon the trial, no objection was taken to the admission of evidence as to the plaintiff's damage resulting from a diminished rental value, upon any ground suggesting the point argued. The evidence was principally adduced to prove the difference in the rental value of the premises, previous and subsequent to the construction of the road, and it was upon that basis that the plaintiff's recovery rested. But, assuming that the question was fairly and competently raised upon the trial, through such a request to charge, we think there was no error in the ruling of the trial judge.

The plaintiff sued for past damages and proved that such had actually been sustained in a diminished rental value, and from causes connected with the existence of this railroad. The action was not based upon any theory of the continuing nature of the trespass, nor was the recovery predicated upon any anticipation of its continuance.

It was for damages actually suffered in the past. So that

the defendant's case resolves itself into the mere proposition that a lessor, or landlord, who has sustained a damage to his property in the past, from the defendant's tortious acts, is without remedy, or right of action, if he was not in the physical possession of the premises. If this proposition is true, it operates to deprive the owner of the property of his right to recover for a damage inflicted by the defendant; and as the element of damage is in the diminished rental value and, of course, is peculiar to the owner of the property, the defendant would go free and relieved of the obligation to make compensation for a loss actually caused by it. This is abhorent to the judgment. The wrong complained of, and for which a recovery has been had, was one committed upon the owner's rights and not affecting the occupants of the premises. If the tenants had a cause of action against the defendant for some injury to their right to the enjoyment of the possession of the premises, accruing after the leasing, it would be quite different from the landlord's. There is no principle of law, that I am aware of, which limits the number of actions which may be brought against a wrong-doer by those persons who have suffered from his acts. The owner of the property has his remedy for the injury done to the inheritance by a trespasser, as the tenant has his remedy for any injury done to the possession. In either case, it is a matter of proof as to the damage sustained by the particular complainant, and neither litigant is the representative of the other in an action of trespass.

In *Francis* v. *Schoellkopf* (53 N. Y. 152), which was an action of damages, growing out of a neighboring nuisance, brought by the owner of the property, her right of recovery was limited to the loss of rents and to the diminution of rent when a tenant was obtained. She was not permitted to recover for the injury done to the tenants while occupying the property. This marks the just distinction in the respective rights of recovery of landlord and tenant.

The appellant makes an elaborate argument upon the theory that as the effect of a conveyance would be to vest a purchaser of the property with the right of action against the defendant

and to divest the seller, notwithstanding the sale was at a diminished price, the same principle should be made to apply to the case of the lessor and lessee of property. We have had occasion to pass upon the question, which this proposition raises, in the *Kernochan* case,* decided at the present term, and the discussion there renders it unnecessary to say anything here.

The judgment should be affirmed, with costs.

All concur, except EARL, J., not voting.

Judgment affirmed.

Ante, page 559.

MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS VOLUME, WHICH ARE NOT REPORTED IN FULL.

MORRIS GOLDSTEIN, Appellant, *v.* HENRY PARKER, Respondent.

(Argued May 4, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 4, 1891, which modified, and affirmed as modified, a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Special Term.

S. W. Rosendale for appellant.

H. Joseph for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

GEORGE W. PALMER, Respondent, *v.* EUGENE H. CONANT et al., Appellants.

(Argued May 5, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 6, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

C. D. Prescott for appellants.

P. H. Fitzgerald for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

HARMON H. HART, Appellant, *v.* THEODORE W. MYERS et al., Respondents.

(Argued May 5, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Michael H. Cardozo for appellant.

A. J. Simpson for respondents.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

PATRICK PHILLIPS, Respondent, *v.* THE ROME, WATERTOWN AND OGDENSBURG RAILROAD COMPANY et al., Appellants.

(Argued May 5, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 11, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court at Circuit on trial without a jury.

Edmund B. Wynn for appellants.

Joseph Mullin for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

JAMES H. MORAN, Appellant, *v.* THE BOARD OF TRUSTEES OF THE VILLAGE OF WHITE PLAINS, Respondent, et al.

(Argued May 6, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

made December 8, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Edgar A. Turrell for appellant.

H. T. Dykman for respondent.

Wilson Brown, Jr., for defendant John O. Merritt.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

JOSEPH SNELLING, Respondent, *v.* THE BROOKLYN AND NEW YORK FERRY COMPANY, Appellant.

(Submitted May 5, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

James & Thomas H. Troy for appellant.

Charles J. Patterson for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

WILLIAM C. WALLACE, Respondent, *v.* THE VACUUM OIL COMPANY, Appellant.

Where a question put to a medical expert calls for his opinion, based upon the knowledge of the witness himself and what he may have derived from outside sources and not predicated solely upon the facts in evidence, or where, among other things, it calls for the witness's opinion as to possible consequences, such as are speculative and not reasonably certain, a specific objection is necessary to present the point on appeal.

A general objection to a question will not suffice, unless the question is altogether improper, or the evidence called for is in its nature quite inadmissible.

A medical expert may properly give his opinion, as a witness, as to the natural and reasonably certain consequences to be expected from physical injuries, also upon a hypothetical case presented by a question predicated upon facts disclosed by the evidence.

Strohm v. *N. Y., L. E. & W. R. R. Co.* (96 N. Y. 305), distinguished.

(Argued May 6, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 29, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

The following is the opinion in full:

"The appellant relies upon the point that, in the admission of certain evidence, the trial court materially erred. The action was brought to recover damages for personal injuries, of a severe and permanent nature, received by plaintiff from an explosion of naphtha, which had leaked into the city sewers from a defective pipe belonging to defendant. The physician who attended the plaintiff was examined as a witness and gave evidence concerning the nature and duration of the injuries. The errors in the rulings, which were insisted upon before us, the counsel finds in the course of the examination of this witness. He was asked:

'Q. Assuming the man's age to be from fifty-eight to sixty years, and judging from that and from the whole history of his case and what you have learned of it in all ways, would you say that it is your opinion that the trouble of the heart is likely to improve to any extent in his case or not?

'[Objected to as immaterial and incompetent. Received. Exception.]

'A. I think it is not likely to improve.

'Q. The same question in regard to his neck and spine and the position of his head — what do you say in regard to that trouble, from your history of the case and your experience with it?

'[Objected to as immaterial and incompetent. Received. Exception.]

'A. The spinal trouble would improve were it not for the fact that he is obliged to carry himself in this condition. That will keep up an irritation of the spine continually, because this stiffening cannot be removed.'

"It is to be observed that the objection does not specify the grounds for excluding the question, or in what respects the evidence, called for by the question, is improper and it is, in effect, general in its nature. As a general objection, it may be conceded that it would suffice if the question was altogether an improper one; or the evidence called for, in its nature, quite inadmissible. But we cannot say that. The witness was qualified to give his opinion upon the natural and reasonably certain consequences in the future to be expected from the physical injuries and disturbances, from which the plaintiff suffered, and such evidence would be properly admitted. He might also have properly given his opinion upon a hypothetical case, presented by a question which resumed the facts disclosed by the evidence. The objectionable feature in the questions, as asked, consisted in the counsel's calling for an opinion based upon the witness's knowledge of the plaintiff's physical condition, which he may have derived from outside sources, and might not be predicated soley upon the facts in evidence, and the question allowed the witness to state possible consequences, and such as were speculative and not reasonably certain. But had the objection to the questions stated these grounds, the examining counsel, if he desired to press the examination in that line, might have recognized its correctness and have changed the form of his question, eliminating the objectionable elements. In the case of *Strohm* v. *N. Y., L. E. & W. R. R. Co.* (96 N. Y. 305), as in other cases cited from the reports of this court, the grounds of the objection were specified. That mode of procedure, in confining the examination of a witness within strict legal limits, is proper and it is the one which we have endeavored to emphasize. (*Turner* v. *City of Newburgh*, 109 N. Y. 301.)

"The judgment and order should be affirmed, with costs to respondent."

Marsenus H. Briggs for appellant.

George C. Wolcott for respondent.

GRAY, J., reads for affirmance.
All concur.
Judgment affirmed.

CHARLES B. DE KLYN, Appellant, *v.* SILVER LAKE ICE COMPANY, Respondent.

(Argued May 7, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 5, 1891, which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint on trial at Circuit.

H. Morrison for appellant.

Wallace Macfarlane for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

ALBERT KELLEY et al., Appellants, *v.* DANIEL J. SPRAGUE et al., Respondents.

(Agued May 7, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1890, which affirmed a judgment in favor of defendants, entered upon the report of a referee.

J. Noble Hayes for appellants.

Nathaniel Meyers for respondents.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

ANDREW MOYLAN, Respondent, *v.* THE SECOND AVENUE RAILROAD COMPANY, Appellant.

In an action to recover damages for injuries received by plaintiff while getting on one of defendant's street cars, it appeared that plaintiff was a man twenty-six years old, able-bodied and unincumbered; he waited for one of defendant's open cars upon a crosswalk and motioned for it to stop; when it had nearly stopped he put his foot on the step on the side of and near the middle of the car and took hold of the stanchion, and after the car had moved six or seven feet, he was struck by the wheel of a truck which was standing in the street. *Held*, that a refusal to nonsuit was error; that it was plaintiff's duty to see, before getting on the car, that there was no obstacle outside the car which would make it dangerous for him to attempt to get on board; and that if the injury was attributable to any negligence, it was, in part at least, that of plaintiff.

(Argued May 7, 1891; decided June 2, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The following is the opinion in full:

"The plaintiff was injured in June, 1890, while getting upon one of the defendant's cars in the city of New York, and he brought this action to recover damages for his injuries, alleging that they were caused by negligence attributable to the defendant. Upon the trial he was the sole witness to prove how the injuries were caused, and upon that point his evidence upon direct examination was as follows: 'I waited for the car; I saw the car coming — an open car; I waived my finger and heard the whistle blow to stop the car; the car slacked; I stepped on the crosswalk and waited for the car, but the car never stopped; it nearly stopped; I waited for the center of the car, and put my foot on the step and took hold of the stanchion, and I heard the whistle blow and the horses went faster — very fast, and I was struck by a truck the other side before I had time to go in the car; the car started and the truck was in the street; the portion of my body which was not in the car struck an empty truck to which horses were attached.'

Upon his cross-examination he testified as follows: 'I struck the hub of the truck in about a second after the car started with me; the car was moving at the time, but had nearly stopped; I was struck about six or seven feet from the crossing where I got on.' The defendant called but one witness to the accident, a passenger in the car. His evidence was in the main like that of the plaintiff. He testified that the plaintiff got upon the sideboard about the middle of the car while the car was moving slowly, and before he got into the car, about six or eight feet from where he got on, the hub of the hind wheel of the truck struck his foot, and the car stopped about the middle of the truck. He did not observe that the speed of the car was accelerated after the plaintiff got on.

"The plaintiff was a young man twenty-six years old in good health, and at the time of the accident unincumbered.

"Upon these facts we think the plaintiff should have been nonsuited. It is impossible for us to perceive wherein the defendant was guilty of negligence, or if it was guilty, wherein it was more guilty than the plaintiff. It was not careless for the plaintiff to attempt to enter the car while it was slowly moving. Thousands of young men get on and off street cars daily and are permitted to do so in perfect safety. No negligence can, therefore, be imputed to the defendant merely because it did not stop the car for the plaintiff. But for the truck in the street he would have entered the car in safety, and would have been uninjured. The sole question, therefore, is whether the defendant ought to have guarded the plaintiff against injury from the truck in the street near its track. It was not bound to know that the truck was temporarily there so close to its track that there was danger that a person attempting to get into one of its cars might be injured by collision therewith. There was no evidence that the driver or conductor of the car saw the truck or perceived the danger, and it does not even appear that the conductor was in a position to see the truck. The plaintiff when he attempted to get upon the car was probably nearer the truck than the conductor was and he had a better opportunity to see the truck than the conductor had, as it was on the same side of the car with him, near him, in plain sight, in fact in his immediate

presence. If the conductor was careless in not seeing it he was more careless. If the conductor was bound to guard him against the danger so he was also bound to care for himself. It was his duty to see for himself that there was no obstacle in his immediate presence outside of the car and the railway track, which made it dangerous for him to attempt to enter the moving car.

"It cannot be claimed upon the evidence that the defendant caused the accident by any undue acceleration of the speed of the car. The car was moving slowly and had nearly stopped when he stepped upon it, and in about one second and before the car had gone eight feet, he struck the truck. It is utterly impossible that the car could have greatly increased its speed in that short space of time and that limited distance.

"The injury to the plaintiff, therefore, seems to have been the result of an accident. But if it was due to any negligence it was due more to his own negligence than that of the defendant.

"The judgment should be reversed and a new trial granted, costs to abide the event."

Augustus S. Hutchins for appellant.

Frederick S. Massey for respondent.

EARL, J., reads for reversal.
All concur.
Judgment reversed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* SAMUEL A. WAYMAN, Appellant.

Under the provision of the Code of Criminal Procedure (§ 542), which requires this court, on appeal to it in a criminal case, to "give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties," where incompetent evidence bearing upon a collateral issue has been received, but it appears that the evidence could have had no important effect upon the result, the error is not a sufficient ground for a reversal.

It is not error for a court to refuse to embody the language of an elementary writer in a charge to the jury; the trial judge may select the words

in which he chooses to express his views of the law, and unless he lays down incorrect propositions, or refuses to instruct them as to pertinent, material and necessary points, there is no error calling for the interposition of an appellate court.

(Argued April 22, 1891; decided June 9, 1891.)

APPEAL from judgment of the Court of Oyer and Terminer, held in and for the county of Livingston, entered upon a verdict convicting the defendant of the crime of murder in the first degree.

The following are extracts from the opinion:

"The defendant was indicted at the Livingston county Oyer and Terminer, in May, 1890, jointly with Nelson Swartz, for the crime of murder in the first degree, in killing one Emory Thayer at Avon, Livingston county, by shooting him with a pistol, on October 27, 1885, while the defendants were engaged in the perpetration of the crime of burglary in the house of said Thayer. Before the trial, upon the request of Swartz, the court ordered the defendants to be separately tried, and thereupon the district attorney moved the trial of the defendant Wayman. The jury found the defendant guilty of the crime charged, and he appeals from the judgment of conviction to this court.

"The principal ground urged by him for a reversal of the judgment is that the verdict is against the weight of evidence, and that under the provisions of the Code of Criminal Procedure, as amended by chapter 493 of the Laws of 1887, authorizing this court to grant a new trial if it is satisfied that the verdict was against the weight of evidence, or against law, or that justice requires a new trial, whether exceptions shall have been taken or not in the court below, he should have a new trial. This act has been the subject of consideration in this court in several cases, and especially in the *Cignarale* case (110 N. Y. 23), where the rule was laid down that 'in determining whether a new trial should be granted under the statute, it is not the province of this court to review and determine controverted questions of fact arising upon conflicting evidence. The jury is the ultimate tribunal in such a case, and with its decision the court may not interfere, unless it reaches

the conclusion that injustice has probably been done.' The decision of the case, therefore, requires that we should examine the evidence given on the trial."

'After a full presentation and discussion of the evidence the opinion proceeds thus:

"We are not prepared to say that the jury erred in disposing of the question presented, or that any such injustice has been done the defendant in the result of the case on the facts, as requires us to grant a new trial.

"The exceptions taken to the admission and exclusion of evidence and to the judge's charge, are generally quite unimportant and require but little consideration. The defendant's counsel read a section from Greenleaf on Evidence in respect to the weight to be given to proof by parol admissions, and requested the court to charge the jury in the language there employed. While the work referred to is, undoubtedly, one of high reputation and entitled to great weight in the consideration of questions of evidence, it is not error for a court to refuse to embody the language of an elementary writer in a charge to the jury. The language used by the author might not have been improper; but the judge must be left to select the words in which he chooses to express his views of the law to the jury, and unless he lays down incorrect propositions, or refuses to instruct them as to pertinent, material and necessary points called for by the circumstances of the case, he does not commit any error calling for the intervention of an appellate court. We think the judge said all on the subject of evidence by admissions, which the nature of the case required.

"It is also claimed that error was committed by the trial judge in permitting the witness Swartz to state the contents of the letter received by him from Wayman, which had been destroyed. Swartz had testified that he was unable to read writing and was informed of the contents of the letter by another who read it to him. His knowledge on the subject was, therefore, apparently hearsay and presumptively inadmissible. The case, however, is peculiar and the authorship and contents of the letter are confirmed by many circumstances aside from the evidence of Swartz.

"It was testified by Wayman that when he started for Holly he promised to communicate with Swartz if he found work for him to do and that he did write to him from that place about the time this letter was received by Swartz.

"There was also proof that Wayman admitted that he wrote a letter to Swartz requesting a meeting with him at Lakeville but claimed that there was nothing in the letter referring to the murder.

"Whatever question, therefore, there may be about the admissibility of this evidence, it may be obviated by considering the effect which it probably had upon the result of the case.

"The evidence was undoubtedly relevant and proper to be taken into consideration with the other proof in the case.

"There was nothing in the contents of the letter as testified to by Swartz, bearing upon the circumstances of the crime and it was material only as affording support to Swartz's testimony that he did meet Wayman on the day in question. This was a collateral circumstance and the case would not have been materially impaired if the evidence objected to had been stricken from the case.

"In view of these circumstances and the strength of the case against the defendants, we think the erroneous admission of Swartz's evidence, as to the contents of the letter, had no important effect upon the result of the trial, and authorizes us to decline to grant a new trial under the provisions of section 542 of the Code of Criminal Procedure for this reason. There seems to be no other exception of sufficient importance to merit discussion.

"The judgment should, therefore, be affirmed."

George P. Coyne for appellant.

George W. Daggett for respondent.

RUGER, Ch. J., reads for affirmance.
All concur, except ANDREWS, J., not voting.
Judgment affirmed.

128 589
146 270

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* SCHIHIOK JUGIGO, alias SCHIBUYA JUGIRO, Appellant.

When, in a criminal case, all the forms of law have been observed and the defendant has had every opportunity to make his defense, and his conviction has been affirmed by the highest court of the state, the contest in the courts should end.

As to whether, it being the duty of attorneys and counselors of the courts of this state to aid in the administration of justice, if they in such case engage in vexatious proceedings, merely for the purpose of undermining the final judgment of the courts and defeating the law, do not expose themselves to the disciplinary power of the Supreme Court, *quære*.

(Argued June 1, 1891; decided June 9, 1891.)

THIS was a motion for a reargument.

A *mem.* of the case is given in 123 N. Y. 630.

The following is the opinion in full:

"In December, 1889, the defendant was convicted of murder in the first degree. He appealed to this court, and his case was argued in June, 1890, a few days before the summer recess. The judgment was here affirmed October 7, 1890, and the following opinion was then written: 'The record does not contain a single exception, and we are unable to perceive any reason for bringing the appeal except to delay the execution of the judgment. The evidence established beyond any doubt the commission of the crime, and the charge of the judge was fair and properly instructed the jury upon the law needful for their guidance. There can be no pretense for saying that the ends of justice require a new trial, and the judgment should be affirmed.'

"The subsequent proceedings in the case on behalf of the defendant have been discreditable to the administration of justice. His case has been twice to the Supreme Court of the United States, and is now here for the third time, and thus courts have been needlessly vexed for no possible purpose except delay.

"Upon this occasion a motion is made for a reargument of the case after a lapse of nearly a year from the original argument upon pretexts manifestly frivolous, and for which there

can be no possible excuse or justification, and which will not now be dignified by any further notice.

"When all the forms of law have been observed, and the defendant has had every opportunity to make his defense, and his conviction has been affirmed by the highest court of the state, the contest in the courts should end, and the final judgment should be executed unless the governor of the state, in the exercise of his clemency, should grant a reprieve or a pardon. The forms of law should not be used to subvert the criminal law of the state.

"Attorneys and counselors admitted to practice in the courts of this state are under a duty to aid in the administration of justice, and they cannot consistently with this duty engage in vexatious proceedings merely for the purpose of undermining the final judgments of the courts and defeating the behests of the law. It ought to be a subject of inquiry, therefore, whether they can thus become the allies of the criminal classes and the foes of organized society without exposing themselves to the disciplinary powers of the Supreme Court.

"The motion should be denied."

John R. Heinzelman for appellant.

McKenzie Semple for respondent.

Per Curiam opinion for denial of motion.
All concur.
Motion denied.

MARY BRADLEY, as Administratrix, etc., Appellant, *v.* NESTOR DE GORCOURIA, Respondent.

(Argued June 1, 1891; decided June 9, 1891.)

MOTION for reversal of judgment under section 1298 of the Code of Civil Procedure.

Thomas C. Enever for motion.

Coudert Brothers opposed.

Agree to grant motion; no opinion.
All concur.
Motion granted.

THE PEOPLE ex rel. THE NEW YORK PHONOGRAPH COMPANY, Appellant, *v.* FRANK RICE, Secretary of State, Respondent.

(Argued June 8, 1891; decided June 16, 1891.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made September 24, 1890, which affirmed an order of Special Term denying a motion for a peremptory mandamus.

Noah Davis and *L. Pincoffs* for appellant.

Charles F. Tabor, Attorney-General, for respondent.

Agree to affirm on opinion below.
All concur.
Order affirmed.

DENNIS W. MORAN, Respondent, *v.* GEORGE CONOMA et al., Defendants, MAYER LOEB et al., Purchasers, Appellants.

(Argued June 1, 1891; decided June 16, 1891.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made March 2, 1891, which affirmed an order of Special Term granting plaintiff's motion to compel the appellants, as purchasers of certain mortgaged premises, to complete their purchase.

Emanuel J. Myers for appellants.

James Kearney for respondent.

Solomon F. Higgins for defendants.

Agree to affirm; no opinion.
All concur.
Order affirmed.

THE PEOPLE ex rel. WILLIAM H. OSBORN, Appellant, *v.* EDWARD GILON et al., as and Comprising the Board of Assessors, Respondents.

(Argued June 8, 1891; decided June 16, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 14, 1890, which affirmed an order of Special Term denying the relator's motion for a mandamus.

Truman H. Baldwin for appellant.

David J. Dean and *George L. Sterling* for respondents.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

JAMES E. EGGLESTON, Appellant, *v.* MILES BEACH, Respondent.

(Argued June 3, 1891; decided June 16, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 24, 1890, which affirmed an order of Special Term denying a motion for leave to amend the complaint.

Henry S. Bennett for appellant.

Aug. C. Brown for respondent.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

D. HARTMAN TABER, as Receiver, etc., Appellant, *v.* SAMUEL JACK, Respondent, et al.

(Argued June 4, 1891; decided June 16, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made the first Tuesday

of January, 1891, which affirmed an order of the Special Term denying a motion to punish the defendant, Samuel Jack, for non-compliance with a judgment.

H. B. Cone for appellant.

M. H. Peck for respondent.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

ALBERTUS LARROWE, Appellant, *v.* HERMAN J. LEWIS et al., Respondents.

In an action to recover an over payment alleged to have been made to defendants upon a contract for the purchase of railroad ties, it appeared that plaintiff agreed to take at certain prices for different woods, all ties defendants could get during the season, "ties to be counted and paid for before put in the river." Defendants were not paid more than they were entitled to for ties actually delivered and accepted, reckoning them at the prices fixed by the contract. The referee found that the word "counted," as used in the contract, meant inspected. Plaintiff claimed that, as on inspection part of the ties delivered were classified by plaintiff's inspectors as seconds, and were in fact seconds, he was not bound to pay therefor the price for first-class ties. *Held*, untenable; that the finding that the word "counted" means "inspected," might authorize the rejection of all but first-class ties, but did not in the absence of a provision in the contract to that effect, justify the conclusion that both firsts and seconds might be accepted and only the actual value of the seconds paid for them.

(Submitted June 8, 1891; decided June 16, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1890, which affirmed a judgment in favor of defendants entered upon the report of a referee.

The following is the opinion in full:

"It is conceded that the defendants were not paid any money in excess of that to which they were entitled for ties actually delivered and accepted by the plaintiff, reckoning them at the price fixed by the contract. The claim of the plaintiff is that the payments were made in advance, and that as part

of the ties delivered were, upon inspection by the plaintiff's inspector, classified as seconds and were, in fact, seconds, that the plaintiff was not bound to pay therefor the price of first-class ties, and, consequently, that he is entitled to recover the deficiency as an over payment.

"The difficulty is that by the contract one price was to be paid for all the ties the defendant should deliver. The finding that the word "counted" means "inspected" might authorize the rejection of all but first-class ties, but it does not justify the conclusion that the plaintiff might accept both classes and pay only for the second class their actual value, in the absence of any provision in the contract to that effect.

"The plaintiff requested a finding that this was the custom in contracts of this kind. The evidence is contradictory upon the point, and the referee refused the request of the plaintiff to find the custom alleged, and to this refusal no exception was taken.

"Upon the case, as presented, there appears to be no error in the record, and the judgment should, therefore, be affirmed."

E. A. Nash for appellant.

J. F. Parkhurst for respondents.

ANDREWS, J., reads for affirmance.
All concur.
Judgment affirmed.

HANNAH COHEN et al., as Administrators, etc., Respondents, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

(Submitted June 9, 1891; decided June 16, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

The following is the opinion in full:

"This action was brought to recover damages for the death of plaintiffs' intestate, caused by negligence attributable to the

defendant. The intestate was the husband of the plaintiff Hannah Cohen and the father of her five small children, all of whom were dependent upon him for their support.

"The action has been tried three times. The first trial resulted in a verdict in favor of the plaintiffs for $5,000. The judgment entered upon that verdict was, upon appeal to the General Term, reversed and a new trial was ordered. (33 Hun, 404.) The second trial resulted in a judgment entered upon a verdict directed by the court in favor of the defendant, which was affirmed at General Term (43 Hun, 345), but was, upon appeal to this court, reversed and a new trial ordered. (113 N. Y. 532.) The third trial resulted in a verdict in favor of the plaintiffs for $4,583.33 and from the judgment entered upon that verdict the defendant appealed to the General Term and from affirmance there to this court.

"The record discloses no ground whatever for this appeal. It contains but one exception and that is to the ruling of the court allowing the plaintiffs to prove the age of the oldest child of the intestate, and that exception is not noticed or relied upon in the brief submitted on behalf of the appellant. The judge in his charge to the jury stated: 'It is conceded by the defendant in this case that there is no question at all involved here of fact for you to determine. It is very plain upon the testimony that the plaintiff is entitled to recover; that is not controverted by the city. The only question, therefore, for you to determine is how much you will award to her.' These remarks were not controverted or objected to on the part of the defendant. The trial judge submitted the question of damages to the jury in a manner entirely satisfactory to the defendant and of which its counsel made no complaint at the time.

"The law of this case was settled upon the prior appeal to this court, and after the last trial there was no just ground for further contention on the part of the defendant. This is, therefore, a proper case for giving effect to the last clause of section 3251 of the Code which provides: 'Where a judgment is affirmed by the Court of Appeals the court may, in its discretion, also award damages by way of costs for the delay, not exceeding ten per centum upon the amount of the

judgment or where it was rendered upon an appeal upon the amount of the original judgment.'

"Therefore, the judgment should be affirmed, with costs, and ten per cent upon the amount of the judgment at the trial term as damages for delay."

William H. Clark for appellant.

Francis B. Chedsey for respondents.

EARL, J., reads for affirmance.
All concur.
Judgment affirmed.

JOHN W. HAYWOOD as Administrator, etc., Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued June 2, 1891; decided June 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 4, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

S. W. Jackson for appellant.

Alonzo P. Strong for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

In the Matter of the Application of EDWARD B. LONG et al., as Trustees, etc.

(Argued June 3, 1891; decided June 23, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 8,

1890, which affirmed an order of Special Term, appointing commissioners to ascertain the compensation to be awarded to Charles Butler, claimant, for land taken for sewage purposes.

Willard Parker Butler for appellant.

H. T. Dykman for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

HENRY C. BOWEN, Appellant, *v.* WILLIAM L. BULL, as President, etc., Respondent.

(Submitted June 3, 1891; decided June 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1890, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee and affirmed an order granting an extra allowance.

Geo. C. Holt for appellant.

Lewis Cass Ledyard for respondent.

Agree to affirm on opinion below.
All concur.
Judgment affirmed.

MARY O'TOOLE, Respondent, *v.* CENTRAL PARK, NORTH AND EAST RIVER RAILROAD COMPANY, Appellant.

(Argued June 4, 1891; decided June 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Henry Thompson for appellant.

James F. Higgins for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

CHARLES S. HIGGINS et al., Appellants, *v.* JAMES D. BELL, as Commissioner, etc., Respondent.

(Argued June 5, 1891; decided June 23, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made June 28, 1889, which affirmed an order of Special Term vacating an injunction.

Charles Edward Souther for appellants.

F. A. McCloskey for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

HERMAN CANTOR, as Assignee, etc., Respondent, *v.* FERDINAND LEVY et al., Appellants.

(Argued June 5, 1891; decided June 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

S. F. Kneeland for appellants.

Morris J. Hirsch for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* THOMAS F. WYNN, Respondent.

(Argued June 8, 1891; decided June 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1890, which reversed a judgment of the Court of General Sessions of the Peace entered upon a verdict convicting the defendant for violating section 351 of the Penal Code.

McKenzie Semple for appellant.

William F. Howe for respondent.

Agree to affirm on opinion below.
All concur, except EARL and PECKHAM, JJ., dissenting.
Judgment affirmed.

JENNIE J. HOLCOMB, Respondent, *v.* THE TOWN OF CHAMPION, Appellant.

(Submitted June 8, 1891; decided June 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 3, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

Mullin & Griffin for appellant.

Porter & Walts for respondent.

Agree to affirm on opinion below.
All concur, except O'BRIEN, J., taking no part.
Judgment affirmed.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent, *v.* MARY A. KENT et al., Appellants.

(Argued June 8, 1891; decided June 23, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 4, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Benjamin Yates for appellants.

David J. Dean for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

128b 600
137 97
128b 600
141 537
128b 600
147 346

In the Matter of the Application of the METROPOLITAN ELEVATED RAILWAY COMPANY, as to Acquiring Title to Real Estate.

In the Matter of WATSON et al.

A decision of the General Term of the Supreme Court, rendered upon report of commissioners appointed to appraise lands in proceedings to acquire title thereto under the Rapid Transit Act (Chap. 606, Laws of 1875) is not reviewable in this court.

(Argued June 15, 1891; decided June 23, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 29, 1890, which affirmed an order of Special Term confirming the report of commissioners appointed under the Rapid Transit Act (Chap. 606, Laws of 1875).

The following is a *mem.* of opinion:

"I think that this court has no jurisdiction to review a decision of the Supreme Court rendered upon the appraisal and report of its commissioners. It has been so held in proceedings to acquire property rights taken under the provisions

of the General Railroad Act of 1850, and so, by parity of reasoning, we must hold where the petitioner is incorporated and proceeds under what is commonly known as the Rapid Transit Act (Chap. 606, Laws of 1875). In the latter act the provisions respecting the acquisition of lands, *in invitum* the owner thereof, are similar as to the procedure to those prescribed in the act of 1850. However serious, therefore, the error of the commissioners may have been in the rejection of the proof relating to the prior adjudication in the equity action between these parties, there is no power in this court to review it upon an appeal from the order of confirmation.

"Appeal should be dismissed, with costs to the respondent."

Edwin M. Felt for appellant.

Julien T. Davies for respondent.

GRAY, J., reads for dismissal of appeal.

All concur.

Appeal dismissed.

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128 601
128 603

GEORGE F. HODGMAN, Respondent, *v.* STEPHEN T. BARKER, Appellant.

Where, upon an application by a subsequent attaching creditor to set aside a former attachment, the facts set forth in the affidavit to prove that the subsequent attachment was a lien upon the same property were not within the personal knowledge of the affiant, but were based upon statements of another person, and no excuse was given for not procuring the affidavits of persons having personal knowledge of the facts, *held* that the court while it could properly have taken the affidavit as sufficient, was not bound so to do, and so that a denial of the application was not error; and this although the affidavit upon which the first attachment was issued was insufficient.

Reported below, 60 Hun, 156.

(Argued June 15, 1891; decided June 23, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made April 8, 1891, which reversed an order of Special Term granting a motion to vacate an attachment in the above-entitled action, and denied said motion.

The following is the opinion in full:

"The National Broadway Bank, as a subsequent attaching creditor, made a motion to set aside the attachment in this action. Judge INGRAHAM at the Special Term vacated the attachment, holding that the affidavit upon which it was granted did not show a cause of action against the defendant, that the attachment obtained by the bank was valid, and that it had thereby obtained a lien upon the same property seized by the attachment issued in this action. From the order of Special Term the plaintiff appealed to the General Term, and there the order was reversed, three opinions being written. Judge VAN BRUNT agreed with Judge INGRAHAM that the affidavit upon which the attachment in this action was issued did not show any cause of action; but he held that the affidavit upon which the attachment of the bank was issued was insufficient, and also that it did not appear that the attachment of the bank was levied upon the same property seized by the attachment in this action. Judge DANIELS concurred with Judge VAN BRUNT on the ground that it did not appear that the bank had attached the same property seized by the attachment in this action. Judge LAWRENCE writing a dissenting opinion agreed with Judges INGRAHAM and VAN BRUNT that the affidavit upon which the attachment in this action was granted, does not show a cause of action in favor of the plaintiff against the defendant, and he held that the attachment of the bank was based upon a sufficient affidavit and that it appeared that it was levied upon a portion of the same property seized by the attachment in this action; and he, therefore, favored the affirmance of the order of the Special Term. From the decision of the General Term the bank has appealed to this court.

"It is not necessary now to determine whether the affidavit upon which the attachment in this action was issued is sufficient. Two of the judges of the General Term concurred in holding that it did not appear that the bank had a lien upon the same property attached in this action, and that, therefore, it had no standing which enabled it to move to set aside the attachment. We will not now enter into a minute criticism of the affidavit presented to the Special Term to show that the

bank had a subsequent attachment lien upon the property attached in this action. It is sufficient that the affidavit to prove the lien was not satisfactory to the Supreme Court. The facts were not within the personal knowledge of the person making the affidavit. They were based upon information received from another person, and no excuse whatever was given for not procuring the affidavits of the persons having personal knowledge of the facts. Even if the Supreme Court could properly have taken the affidavit based upon information and belief as sufficient, it certainly was not bound to, and without committing any legal error it could refuse to grant the motion based upon such an affidavit. It is not for this court to say that it ought, and much less that it is not bound to be satisfied with such an affidavit.

"We are, therefore, of opinion that the order of the General Term should be affirmed with costs."

William F. MacRae for appellant.

Eugene K. Sackett for respondent.

Per Curiam opinion for affirmance.
All concur.
Order affirmed.

NATIONAL BROADWAY BANK in the City of New York, Plaintiff, *v.* STEPHEN T. BARKER, Defendant.

(Argued June 15, 1891; decided June 23, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 15, 1891, which affirmed an order of Special Term denying a motion to vacate an attachment in the above-entitled action.

This case presented the same question, and the *mem.* of opinion is substantially the same as that in the last preceding case (*Hodgman* v. *Barker*).

P. Q. Eckerson for appellant.

William F. MacRae for respondent.

Per Curiam mem. for affirmance.

All concur.

Order affirmed.

THE RECTOR, ETC., OF HOLY TRINITY CHURCH of Harlem, etc., Appellant, *v.* THE RECTOR, ETC., OF THE CHURCH OF ST. STEPHEN, ETC., Appellant, and JAMES BLACKHURST, Respondent.

THE PEOPLE ex rel. THE RECTOR, ETC., OF THE CHURCH OF ST. STEPHEN, Appellant, *v.* JAMES BLACKHURST, as Treasurer, etc., CHARLES E. FLEMING et al., Respondents.

An appellant will not be denied the right to withdraw his appeal and discontinue the litigation, because of the fact that the attorney who brought the appeal, but who has ceased to represent the appellant, objects thereto.

(Argued June 15, 1891; decided June 23, 1891.)

MOTIONS to dismiss appeals.

The following is the *mem.* of opinion:

"The motions upon the petitions for the withdrawal of the above-entitled appeals should be granted.

"The objections of Andrew J. Shipman, who has claimed to be attorney for the corporation of the Church of St. Stephen, cannot avail against the desire of that corporation, as expressed by the vestry. The wardens and vestrymen elected at the Easter election, 1891, represent the corporation appellant in the above action and proceeding, and they have authorized the motions now made through attorneys named for that purpose. To permit the appeals to continue to be prosecuted would be to deny the right to an appellant to discontinue litigation, with no other reason than to gratify the wishes of an attorney who, whatever the foundation of his original authority to appear, has ceased to represent the litigant. There is nothing in the procedure which is objectionable, and we see no reason for denying the appellant's applications.

"There will be no costs awarded to any of the parties as against the other; except ten dollars costs of each of the two

motions against the attorney Shipman in favor of the corporation of the Church of St. Stephen."

Wager Swayne for appellant.

William H. Hamilton for respondents.

Per Curiam mem. for dismissal of appeals.
All concur.
Appeals dismissed.

In the Matter of the Application of THOMAS COMMERFORD MARTIN, Respondent, for a Peremptory Writ of Mandamus, *v.* THE W. J. JOHNSTON COMPANY (Limited), Appellant.

Upon the granting of a peremptory writ of mandamus, with costs, an application for a stay pending appeal having been denied, defendant complied with the writ, paid the costs and appealed to the General Term, where the appeal was dismissed, the court holding that it was not a practical question, the terms of the writ having been complied with. *Held*, error; that the case should have been heard on the merits, as defendant would be entitled to a restoration of the costs paid, in case the order were reversed.

(Argued June 16, 1891; decided June 23, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 5, 1891, which dismissed an appeal from an order of Special Term granting an application for a peremptory writ of mandamus.

The following is the *mem.* of opinion:

"The Special Term granted the writ, with costs. The defendant asked for a stay pending an appeal, which was denied. It then complied with the writ, and paid the costs, and appealed to the General Term. That court dismissed the appeal on the ground that it was not a practical question, as the terms of the writ of mandamus had been complied with.

"The court should have heard the case on the merits, because there was a question of costs which defendant had paid and which it would be entitled to have restored to it in case the order were reversed.

"Order of General Term reversed and case remitted to that court with directions to hear the appeal upon the merits, with

costs of this court upon this appeal to appellant to abide the event of the appeal to the General Term."

Mason F. Prosser for appellant.

Arthur H. Masten for respondent.

Per Curiam mem. for reversal.
All concur.
Order reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOHN DEWEY, Appellant.

The Court of Appeals, on appeal to it, can consider only errors alleged to have been committed by the court below, and the case must be heard upon the same record which was used before the General Term.

A reversal of a judgment, therefore, cannot be based upon matter subsequently brought into the case by stipulation, and such a stipulation will be disregarded.

(Argued June 16, 1891; decided June 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1890, which affirmed a judgment of the Court of Sessions of Erie county, convicting defendant of the crime of being a common gambler, and also affirmed an order of said court overruling a demurrer interposed by defendant, and an order overruling a plea of a former conviction.

The following is the *mem.* of opinion:

"The stipulation which we find in the printed case, made by the parties after the decision of the General Term, cannot be considered upon this appeal. It is no part of the record. The case must be heard here upon the same record which was before the General Term. The parties cannot agree upon a case and submit it to this court for decision. This is purely a court of review and we consider only errors alleged to have been committed by the court below. We cannot base a reversal of the judgment appealed from upon matter subsequently brought into the case by stipulation. Therefore, disregarding the stipulation, we see no reason to doubt that the judgment

of the General Term is right, and it must be affirmed upon the opinion there pronounced."

Tracy C. Becker for appellant.

George T. Quinby for respondent.

Per Curiam mem. for affirmance.
All concur.
Judgment affirmed.

ANNIE BARRETT, an Infant, by her Guardian *ad litem*, Appellant, *v.* GEORGE WALDO SMITH et al., Respondents.

In an action against the owners of a truck, to recover damages for alleged negligence, the evidence tended to show these facts: The driver was driving very rapidly along a street, upon one side of which there was no sidewalk and this side was bounded by a wall near which some children were playing, among them the plaintiff. The children were in plain view of the driver; the truck moved along without turning, about three feet from the wall; plaintiff was struck by one of the horses and injured. *Held*, that the evidence sufficiently showed negligence on the part of the driver to require the submission of the question to the jury.

(Argued June 15, 1891; decided June 23, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 4, 1891, which affirmed a judgment entered upon an order of the court on trial at Circuit dismissing the complaint.

The following is the opinion in full:

"We are of opinion that the case should have been submitted to the jury. It is undisputed that the children were in plain view of the driver when he was several blocks away. They had gathered next to the high wall on the east side of the avenue, attracted there by the escape of a bird which had flown into an opening in the wall near the bottom. The roadway was at this point about twenty-five feet wide, between the curb of the sidewalk on the west side of the avenue and the wall, there being no sidewalk on the side next to the wall. All the witnesses concur in stating that the truck was being driven very fast. One witness, who was in a wagon back of the truck and going in the same direction, testified that the truck was moving at the rate of six miles an hour, a speed in excess

of that permitted by the ordinance. It was moving parallel with the wall, but there is some discrepancy as to the distance therefrom. The person in the wagon following the truck, a block and a half behind, thought the distance was about fifteen feet. One of the children at the wall, a boy twelve years old, said the truck went about three feet away from the wall, and the mother of the plaintiff, who saw the accident from a window opposite, says the same thing.

"The boy McLean says that when the truck came along he went up close to the wall to escape, and that Annie (the plaintiff) was so frightened she did not know where to go, and the horses struck her and she fell. 'She was so frightened that she made a turn to run towards the wall and made another one to run towards the street, and then the horse kicked her.'

"It cannot be said upon this proof that there was an absence of all evidence of negligence on the part of the driver of the truck. The driver was bound to use reasonable care in using the street. He could not keep on his way driving rapidly in plain view of the children and so near the wall as to expose them to danger, taking no precautions, provided he saw them or ought to have seen them. If the jury shall accept the statement of the witness who testified that his truck was being driven at a distance of fifteen feet from the wall, there would be slight ground for imputing negligence. The injury to the child could then be accounted for only on the supposition that without cause she undertook to cross the street in front of the horses, a movement which he could not reasonably have anticipated. But if he drove within three feet of the wall, it would be for the jury to say whether it was, under the circumstances, a reasonable and prudent act. Some of the children were intent upon capturing the bird, and the others, including the plaintiff, were watching the proceeding. If the truck was moving in a path but three feet from the wall, the fright of the plaintiff when she discovered it, was natural and might reasonably have been anticipated by the driver, and the situation ought to have admonished him of the necessity of slackening his speed or crossing to the other side of the road before passing the children.

"If the plaintiff had clung to the wall she would have been

safe, but in her terror she first turned one way, and then toward the horses, and got in front of them and was injured. But she was not chargeable for not taking the most prudent course. The driver (upon the version of the transaction given by the boy) produced by his own conduct that condition of mind in the child which deprived her of even that small degree of judgment which a child of four years of age may be supposed to possess. She tried to save herself from a danger which she might reasonably anticipate, but did precisely the wrong thing. Her mistake, however does not deprive her of remedy, provided the jury should find that the driver was guilty of negligence. We express no opinion as to that fact, and what has been said bears only upon the point whether the case should have been left to the jury.

"The nonsuit was placed exclusively upon the ground that there was no negligence on the part of the driver. The point of contributory negligence of the parents in permitting the child to be in the street was not passed upon by the court. Under the circrmstances proved, that fact was also, we think, for the jury.

"The judgment below shonld be reversed and a new trial ordered, with costs to abide the event."

Richard O'Gorman, Jr., for appellant.

James A. Seaman for respondents.

Per Curiam opinion for reversal.
All concur.
Judgment reversed.

THOMAS KITSON, Respondent, *v.* SARAH F. BLAKE, Appellant.

Same Respondent, *v.* FREDERICK D. BLAKE, Appellant.

(Argued June 15, 1891; decided June 23, 1891.)

MOTIONS to dismiss appeals from orders of the General Term of the Supreme Court in the second judicial department, made May 13, 1891, which affirmed orders of Special Term refusing to set aside inquests and open judgment in favor of plaintiff in the above entitled actions.

Carlisle Norwood, Jr., for motions.

Agree to grant motions; no opinion.
All concur.
Motions granted.

ORIVAL O. CLARK, Respondent, *v.* JOHN CLAFLIN et al., Appellants.

THE ANDERSON AND BLATT FOLDING BED COMPANY, Respondent, *v.* The Same Appellants.

PHILANDER DERBY et al., Respondents, *v.* The Same Appellants.

A motion for judgment of affirmance or to dismiss an appeal, based on the ground that only the same questions arise therein which have been passed upon by this court in other cases lately decided, will not be granted where this is denied by the appellant.

(Argued June 5, 1891; decided June 23, 1891.)

MOTION for affirmance of judgment in the above entitled action, or for a dismissal of the appeals therein, on the ground that the only questions raised had been passed upon in certain other cases lately decided.

The following *mem.* was handed down by the court: "The defendants in each of these entitled actions state that the same questions only arise in them that have been considered and passed upon by this court in the other cases just determined. The court cannot undertake in advance of the argument to examine the records in each to determine for itself whether such statement is borne out or not. The court shall have to do that when the cases come before it regularly, as reached for argument on the calender. If the same questions only arise that have already been passed upon here, it may, of course, be expected they will meet with the same end."

Abram Kling for motion.

S. F. Kneeland opposed.

Agree to deny motion.
All concur.
Motion denied.

In the Matter of the Application of THE ROCHESTER AND GLEN HAVEN RAILROAD COMPANY, Appellant, to Acquire Land of FERDINAND and BARBARA GRIEBEL, Respondents.

(Argued June 8, 1891; decided June 23, 1891.)

MOTION to dismiss an appeal from an order of the General Term of the Supreme Court in the fifth judicial department, made at the January Term, 1891, which reversed an order of Special Term appointing commissioners.

John Powers for motion.

Edward W. Maurer opposed.

Agree to grant motion; no opinion.
All concur.
Motion granted.

In the Matter of the Accounting of ABRAHAM B. VALENTINE, Trustee, etc.

(Argued June 10, 1891; decided June 25, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made March 4, 1891, which affirmed a decree of the surrogate of Westchester county.

Thomas M. Wheeler for appellant.

Israel Minor, Jr., for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

HATTIE H. FARRELL, as Administratrix, etc., Respondent, *v.* ARTHUR J. HORGAN et al., Appellants.

(Argued June 10, 1891; decided June 25, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made

May 4, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Edward W. S. Johnston for appellants.

Charles Steckler for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

JOHN O. HEALD, as Assignee, etc., Respondent, *v.* FRANK B. VAN SICLEN, Impleaded, etc., Appellant.

(Argued June 10, 1891; decided June 25, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made May 4, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

George A. Clement for appellant.

Henry P. Starbuck for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

In the Matter of the Judicial Settlement of the Account of ROBERT C. REEVES, as Executor, etc.

(Submitted June 10, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 13, 1890, which affirmed an order of the surrogate of the city and county of New York directing Robert C. Reeves, as executor, to account.

Henry W. Bates for appellant.

H. J. Morris for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

MAGGIE LAMANNA, as Administratrix, etc., Respondent, *v.* THE NATIONAL SECURITY LIFE AND ACCIDENT COMPANY, Appellant.

(Argued June 11, 1891; decided June 25, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 12, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

D. W. Northup for appellant.

William Allan for respondent.

Agree to affirm; no opinion.
All concur, except EARL, J., not voting.
Judgment affirmed.

JOHN HOOPER, Appellant, *v.* THE JOHNSTOWN, GLOVERSVILLE AND KINGSBORO HORSE RAILROAD COMPANY, Respondent.

(Argued June 12, 1891; decided June 25, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 17, 1891, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit.

Heyward & Pruyn for appellant.

Matthew Hale for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

In the Matter of the Estate of SAMUEL LYMAN, Deceased.

(Argued June 15, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 7, 1891, which affirmed an order of the surrogate of the city and county of New York directing Lydia A. Lyman, as administratrix, to account.

Henry Woodward Sackett for appellant.

Charles E. Miller for respondent.

Agree to affirm; no opinion.
All concur, except RUGER, Ch. J., not voting.
Order affirmed.

THOMAS WATTS, as Receiver, etc., Respondent, *v.* FRANKLIN A. WILCOX et al., Appellants.

(Argued June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 9, 1891, which affirmed an order of Special Term overruling demurrers to the complaint, and affirmed an interlocutory judgment in plaintiff's favor entered thereon.

Henry Bacon for appellants.

William F. O'Neill for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

WILLIAM E. DODGE STOKES, Respondent, *v.* ANSON PHELPS STOKES et al., Defendants, et al., Appellants.

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(Argued June 15, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 11, 1891, which affirmed an order of Special Term overruling a demurrer to the complaint, and affirmed an interlocutory judgment in favor of plaintiff entered thereon.

Edward W. Sheldon for appellants.

George Richards for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

JOHN B. DEVLIN, as Administrator, etc., Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK et al., Appellants.

(Argued June 15, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made April 6, 1891, which affirmed an order of Special Term denying a motion to vacate and set aside the report of a referee.

Franklin Bartlett for appellants.

T. C. Cronin for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

OPHELIA J. CUTHBERT, Respondent *v.* MARGARET S. IVES, Impleaded, etc., Appellant.

Same Respondent *v.* ANTOINETTE L. SCHERMERHORN et al., Appellants.

(Argued June 15, 1891; decided June 25, 1891.)

APPEALS from order of the General Term of the Supreme Court in the first judicial department made May 19, 1891, which affirmed an order of Special Term continuing a temporary injunction.

Robert Sewell and *C. Fine* for appellants.

W. H. Page, Jr., for respondent.

Agree to dismiss appeals; no opinion.
All concur.
Appeals dismissed.

In the Matter of the Application of WILBUR L. PADDOCK for a writ of Habeas Corpus.

(Argued June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 18, 1890, which reversed an order of Special Term awarding to the petitioner the custody of his infant daughter.

W. McElroy for appellant.

M. N. Kane for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

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MAX MERZ, Appellant, *v.* **THE CITY OF BROOKLYN**, Respondent.

(Argued June 16, 1891, decided June 25, 1891.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made October 29, 1890, which affirmed an order of Special Term, sustaining a demurrer to the complaint and affirmed a judgment in favor of plaintiff entered thereon.

James D. Bell for appellant.

Almet F. Jenks for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

In the Matter of the Application of **THE NEW YORK, LACKAWANNA AND WESTERN RAILWAY COMPANY**, to Appraise Lands of **ABRAM M. CHESBROUGH** et al.

(Argued June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made January 23, 1891, which affirmed an order of Special Term denying a motion to set aside the award of commissioners appointed herein.

George W. Cothran and *Albert H. Weed* for appellant.

Franklin D. Locke for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

ORRANDO P. DEXTER, Appellant, *v.* WARREN JOSEPH ALFRED, Respondent.

(Argued June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 29, 1890, which affirmed an order of Special Term changing the place of trial herein.

Edward Winslow Paige for appellant.

William P. Cantwell for respondent.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

ISAAC B. NEWCOMBE et al., Respondents, *v.* WILLIAM A. LOTTIMER et al., Impleaded, etc., Appellants.

(Argued June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 7, 1891, which affirmed an order of Special Term overruling demurrers and affirmed a judgment in favor of plaintiffs entered thereon.

James Thomson for appellants.

Adrian H. Joline for respondents.

Agree to affirm; no opinion.
All concur.
Order affirmed.

In the Matter of the Application of GEORGE H. STONEBRIDGE, JR., Receiver, etc., Respondent, *v.* JOHN B. ALDEN, Appellant.

(Submitted June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 20, 1891,

which affirmed an order of Special Term directing the issuance of a warrant for the examination of the appellant and also affirmed an order of Special Term denying a motion to vacate said warrant.

James B. Dill for appellant.

Charles E. Hughes for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

In the Matter of the Last Will and Testament of EMILY L. DERUSSY, Deceased.

(Argued June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made April 17, 1891, which reversed an order of the surrogate of the county of New York denying a motion to vacate and set aside an order of reference.

Abram Kling for appellant.

Edward C. James for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

THE PEOPLE ex rel. WILLIAM T. CAGNEY, Appellant, *v.* CHARLES F. MACLEAN et al., Comrs., etc., Respondents.

(Argued June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 6, 1890, which dismissed a writ of certiorari and affirmed proceedings by which the relator was removed from office as patrolman in the police department of the city of New York.

Louis J. Grant for appellant.

David J. Dean for respondents.

Agree to affirm; no opinion.
All concur.
Order affirmed.

THE PEOPLE ex rel. JOSEPH C. HIGGINS, Appellant, *v.* HUGH J. GRANT, Mayor, etc., et al., Respondents.

(Argued June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 13, 1891, which dismissed a writ of certiorari and affirmed proceedings by which the relator was removed from the office of clerk to the Supervisor of the City Record.

James F. Higgins for appellant.

David J. Dean for respondents.

Agree to affirm; no opinion.
All concur.
Order affirmed.

THE PEOPLE ex rel. SOLOMON SAYLES, Appellant, *v.* FRANK T. FITZGERALD, Register, etc., Respondent.

(Submitted June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 13, 1891, which affirmed an order of Special Term denying a motion for a writ of peremptory mandamus.

Hess, Towsend & McClelland for appellant.

David J. Dean for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

THE PEOPLE ex rel. THOMAS CECIL, Respondent, *v.* THE BELLEVUE HOSPITAL MEDICAL COLLEGE of the City of New York, of the State of New York, Appellant.

(Argued June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 15, 1891, which reversed an order of Special Term, directing a peremtory writ of mandamus to issue.

Allan McCulloh for appellant.

Seaman Miller for respondent.

Agree to affirm on opinion below.
All concur.
Order affirmed.

GEORGE V. BROWER, as Receiver, etc., Respondent, *v.* JOSEPH D. BAUCUS et al., Impleaded, etc., Appellants.

(Argued June 16, 1891; decided June 25, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 11, 1891, which affirmed an order of Special Term, restraining the defendants from taking further proceedings in an action heretofore brought.

Joseph D. Baucus, Myer Nussbaum and *Edgar T. Brackett* for appellants.

Josiah T. Marean for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

WILLIAM F. MORGAN, Respondent, *v.* CATHARINE TAYLOR, Appellant, et al.

(Argued June 17, 1891; decided June 25, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, entered upon an order made June 17, 1889, which modified, and affirmed as modified, a judgment in favor of plaintiff entered upon the report of a referee.

T. B. Wakeman for appellant.

B. C. Chetwood for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

WILLIS B. SAYRE, Respondent, *v.* THE STATE OF NEW YORK, Appellant.

(Argued June 15, 1891; decided June 25, 1891.)

APPEAL from an award of the Board of Claims in favor of the respondent, made November 11, 1890.

The following is the opinion in full:

"The original award in this case was $3,000, and it was made March 9, 1886. Upon appeal from this award to this court, we modified it by increasing it to $8,136, and affirmed it as thus modified, with costs. The remittitur from this court was sent over to the Board of Claims and thereupon the board made new findings of fact and of law, and awarded to the claimant $10,657.55, which was made up of the $8,136, the interest thereon to the date of the award and the costs of the prior appeal. The attorney-general filed exceptions to this award and then brought this appeal therefrom to this court.

"The practice since the remittitur was sent down from this court has been quite irregular. Upon the prior appeal, we simply modified the prior award by increasing it. We made

no other alteration, not even changing the date. The effect of our decision was that the $8,136 should stand in the place of the $3,000, as of the same date. Thus it was the same award simply increased. The modified award would bear interest from the same date as the original award. If the claimant would have been entitled to interest upon the original award, he became entitled to interest upon the modified award from the same date. Upon the prior remittitur from this court, the prior award, without altering its date, must be increased to $8,136, and the claimant must have his costs of this appeal, and then if the financial officers of the state refuse to pay interest upon the award from its date, the claimant must take his remedy by mandamus, or by filing a new claim with the Board of Claims, for his interest. The question of interest will doubtless be disposed of in the same way as is usual with other awards made by the Board of Claims. That question is not before us now, and we make no other mention in reference thereto.

"The award appealed from must be reversed, with costs of appeal to be paid by the claimant."

Charles F. Tabor, *Attorney-General*, for appellant.

Gabriel L. Smith for respondent.

Per Curiam opinion for reversal.
All concur.
Award reversed.

CHRISTIAN H. STRASSER et al., Respondents, *v.* THE NEW YORK, LACKAWANNA AND WESTERN RAILWAY COMPANY, Appellant.

ROMANNA JEAUME et al., Respondents, *v.* THE NEW YORK, LACKAWANNA AND WESTERN RAILWAY COMPANY, Appellant.

ARGUED and decided with *Reining* v. *N. Y., L. & W. R. Co.* (*ante*, page 157).

THEODORE E. MACY et al., as Executors, etc., Respondents, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY et al., Appellants.

(Argued May 6, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 13, 1891, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Julien T. Davies for appellants.

George Zabriskie for respondents.

Agree to affirm on opinion in *Galway* v. *Met. E. R. Co.* (*ante*, page 132).

NANCY L. SHERWOOD et al., Respondents, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY et al., Appellants.

(Argued May 6, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 9, 1881, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Julien T. Davies for appellants.

George Zabriskie for respondents.

Agree to affirm on opinion in *Galway* v. *Met. E. R. Co.* (*ante*, page 132).

JOHN M. KNOX et al., as Executors, etc., Respondents, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY et al., Appellants.

(Argued May 6, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1890, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Julien T. Davies for appellants.

George Zabriskie for respondents.

Agree to affirm on opinion in *Galway* v. *Met. E. R. Co.* (*ante*, page 132).

THE PEOPLE ex rel. LINA COHEN, Appellant and Respondent, *v.* THE PROTESTANT EPISCOPAL HOUSE OF MERCY of the City of New York, Respondent and Appellant.

In the Matter of the Custody of JENNIE SIMON.

ARGUED and decided with *People ex rel. Danziger* v. *P. E. House of Mercy* (*ante*, page 180).

HENRY DALE et al., Respondents, *v.* FRANK T. GILBERT, as Sheriff, etc., Appellant.

In an action to recover the possession of personal property, defendant gave an undertaking for the return of the property, which contained a recital admitting that plaintiffs had taken the property described in his affidavit and requisition from defendant's possession. Upon the trial, defendant offered to prove that he did not have in his possession, when demand was made upon him, more than one-quarter of the property mentioned in plaintiffs' affidavit, which offer was rejected, upon the ground that the admission was conclusive. Thereafter defendant, with the consent of his sureties, moved at Special Term for leave to substitute a new undertaking without the admission, in place of the original. The motion was denied upon the ground that as the court had held the admis-

sion conclusive, the court had no power to grant it. *Held*, error; that it was conclusive only until set aside, and as to whether or not this should be permitted, rested in the discretion of the Supreme Court.
Martin v. *Gilbert* (119 N. Y. 298), distinguished.

(Argued June 8, 1891; decided October 6, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made January 6, 1891, which affirmed an order of Special Term denying defendant's motion to set aside an undertaking given by him for the return of property replevied herein and for leave to serve a substituted undertaking, omitting therefrom a recital contained in the original admitting that plaintiffs had taken the property described in their affidavit.

The following is the opinion in full:

"In *Martin* v. *Gilbert* (119 N. Y. 298), the question depended upon the proper effect to be given a recital contained in an undertaking which remained unamended and in full vigor as when first delivered. The defendant in that case had given an undertaking by virtue of which he took back the property which had been taken by the coroner under his requisition. That undertaking contained a recital admitting that the plaintiff had taken from defendant's possession the property described in the plaintiff's requisition. Upon the trial, the defendant offered to prove that in fact he did not have in his possession or under his control, when the demand was made upon him, more than one-quarter of the property mentioned in the affidavit of the plaintiff accompanying the requisition. It was rejected by the court and, we thought, properly. We held that the recital in the undertaking was conclusive upon the defendant as to the fact of the amount of the property actually taken, and that the only issue left was as to the fraud. We thought the plaintiff had a right to rely on the recital, and that the defendant ought to be estopped from denying the fact admitted in the undertaking. We there gave some reasons for the conclusion that the plaintiff had this right, and we stated that he might have been misled by the recital, and so have failed to take any further measures to obtain possession of property which the defendant in the undertaking thus solemnly admitted that he was in possession

of and which he kept possession of by reason of such undertaking. The question was not presented as to the right of the court upon the application of the defendant to amend the undertaking by striking out the admission with the consent of the principal and sureties thereto.

"We think the court has the power to permit such amendment, the same as it has the power to permit the correction of many other alleged errors which a party states that he has inadvertently made. Whether it should be allowed or not depends upon the question whether the party in whose favor the error may have been made, can be placed in the same position substantially which he occupied previous to its commission.

"All that was said in the *Martin and Gilbert* case must be construed in connection with the fact that the bond in that case still remained on the record or files of the court unamended and with no motion for leave to amend the same. Upon the principles laid down in that case, it is apparent that an application to amend the undertaking so as to strike out the admission contained in the recital would come too late, when the parties had entered upon the trial, assuming that a motion to so amend the undertaking could be made at the trial. The admission in the above-cited case in fact remained in the undertaking, which was itself part of the record of the case, and was on the files of the court, and so, we held that under the circumstances no evidence could be admitted which should contradict the admission. We assumed, as matter of law, that the party receiving the undertaking relied on the admission contained in the recital, and that no evidence to the contrary was admissible.

"We are still of the same opinion. The admission was, so to speak, a part of the record so long as the undertaking remained unamended, and a party has a legal right to rely upon such an admission, and there is no principle upon which, so long as it remains of record, it should not be conclusive. In this respect it is like an admission in a pleading. While the admission remains, evidence is not admissible to show that the party does not rely upon it. It is an admission of record and is conclusive.

"If the pleading be amended by striking out the admission the truthfulness of the admission is still a question, when proven to have been made, but it is not conclusive upon the party who made it and he may give evidence to show that it was made inadvertently and mistakenly, and then the jury must decide whether, on the explanation, it be correct. (*Strong* v. *Dwight*, 11 Abb. Pr. [N. S.] 319; *Paige* v. *Willet*, 38 N. Y. 28.)

"When the application to substitute an undertaking, or in other words to amend it, shall be presented to the Supreme Court, it will be for that court to say whether, in view of all the facts, it should be granted.

"We said in the *Martin and Gilbert* case (*supra*), that we did not think the defendant should be allowed to contradict admissions of fact made in his own bond, by virtue of which he kept the property which had been taken by the coroner and we thought he was properly concluded by recitals in the bond upon the question of what property was in truth in his possession and taken by the coroner. It must be remembered, however, that it was by virtue of the undertaking, and not of the recital, that the property was taken back by the defendant. He would have been entitled to take back all the property which the coroner actually took from him, without putting a word of the recital in the undertaking. And as has already been intimated the language used in the *Martin* case was used in reference to a bond then on the record and unamended, and in such case we held the admission was conclusive.

"The question will still present itself to the court when the application to amend shall be made, whether in consideration of all the facts, justice would not be promoted by holding the defendant to his admission, and as bearing upon that question the inquiry would be very material, whether the party accepting the undertaking had relied upon the admission contained in it. If it should appear that he had so relied upon it during all the time when, but for such admission he would have made an examination and discovered the truth, and if it should further appear that by permitting the amendment the plaintiff would not be placed in the same position and with the same advantages he would have occupied and possessed had

such admission not been made, a case would be made upon such application for the consideration of the Supreme Court, which we doubt not would be decided by that tribunal in a manner consistent with justice and the rights of the different parties litigant.

"If the amendment were permitted it would still remain a fact that an admission had once been made by the defendant, and the question whether the admission were not, in fact, correct would not alone remain, but if it should appear that the admission had been made under such circumstances as to constitute an equitable estoppel in the plaintiff's favor, the admission would then still remain conclusive as to him.

"Upon the whole we think the Supreme Court had power to deal with the question, and the order denying the motion should be reversed and the case remitted to the Special Term to be heard and decided upon its merits. As the main application of the defendant is addressed to the favor of the court below and it is not at all certain whether it will be granted, or if granted, upon what terms, we think that no costs of this appeal should be granted to either party."

B. Frank Dake for appellant.

Abraham Gruber and *Hadley Jones* for respondents.

PECKHAM, J., reads for reversal.
All concur, except EARL, J., not voting.
Order reversed.

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128 629
138 405
128 629
150 299

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* MARTIN D. LOPPY, Appellant.

In reviewing the evidence on appeal in a criminal case under the Code of Criminal Procedure (§§ 485, 517, 528, as amended by chap. 493, Laws of 1887), where the judgment is of death, this court is governed by the practice regulating appeals to the Supreme Court in dealing with questions of fact.

Unless, therefore, there are circumstances indicating some partiality, mistake, error or prejudice on their part, the findings of the jury on disputed and conflicting evidence must be taken as conclusive.

(Argued June 8, 1891; decided October 6, 1891.)

APPEAL from judgment of the Court of General Sessions of the Peace in and for the city and county of New York, entered November 28, 1890, upon the verdict of a jury convicting defendant of the crime of murder in the first degree.

The following is an extract from the opinion:

"This case is an illustration of the general character of the appeals taken in capital cases, under the recent statute (Chap. 493, Laws of 1887) authorizing appeals directly from the trial to this court. This statute makes the formality of filing and serving a notice of appeal operative as a stay of proceedings on the judgment of conviction, and imposes upon the county where the conviction was had the labor and expense of preparing and printing the record for a review, without regard to the question whether any errors were committed on the trial or not. Thus, without any risk, expense or burden on his part, a convicted criminal is allowed to secure a delay of many months in the execution of his sentence and impose upon the People unnecessary expense, and upon the courts the burden of examining cases generally destitute of merit. The unlimited license thus given to criminals to create delay and expense is invariably availed of, and a large majority of the appeals thus taken to this court have come to us, either without exceptions, or, if any, those usually of the most trivial character. This case forms no exception to the general character of such cases. There is but one exception in the case which has been called to our attention, and that is of a frivolous and unimportant character. The main object which these appeals have, if any beyond creating delay, seems to be to see if the court can, on a review of the evidence, discover some ground, not perceptible to counsel, upon which to base a reversal of the findings of the jury on questions of fact. The rule repeatedly laid down by this court, that such questions are for the exclusive consideration of juries, seems to have had no restraint upon the freedom with which such appeals have been taken, as, indeed, there is no good reason why it should so long as criminals, without trouble or expense to themselves, are encouraged by the law to take appeals and thereby secure delay at all times, and a possible chance of escaping punishment for their crimes. (*People* v. *Wood*, 123 N. Y. 632;

People v. *Jugigo*, Id. 630; *People* v. *Cignarale*, 110 id. 23; *People* v. *Kelly*, 113 id. 647.)

"This condition of the record leaves but one question open to us to examine, and that is whether the evidence discloses any just reason why the judgment of the court below should not be enforced. In reviewing the evidence in such a case this court has frequently laid down the rule that we shall be governed by the practice regulating appeals to the Supreme Court in dealing with questions of fact. This practice regards the jury as the ultimate tribunal for the investigation and determination of questions of fact, and, unless there are circumstances indicating some partiality, mistake, error or prejudice on their part, to regard their findings on disputed and conflicting evidence as conclusive. (*People* v. *Cignarale*, *supra*; *People* v. *Kelly*, *supra*.)

"A careful perusal of the evidence in this case leads us to the conviction that the jury have made no mistake in their verdict."

After a full consideration of the evidence the court say:

"Sufficient has been related of the circumstances of this crime to show that the jury were not only justified in their verdict, but were compelled to the conclusion which it indicated.

"We are, therefore, of the opinion that the ends of justice require us to approve the verdict of the jury and affirm the judgment appealed from."

William F. Howe for appellant.

McKenzie Semple for respondent.

RUGER, Ch. J., reads for affirmance.

All concur.

Judgment affirmed.

HERMAN C. BASKIN et al., as Executors, etc., Appellants, *v.* WASHINGTON D. HAYS, Respondent.

(Argued June 8, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order

made the first Tuesday of January, 1891, which affirmed a judgment in favor of defendants, entered upon the report of a referee.

John Gillette for appellant.

M. A. Leary for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

THE PEOPLE ex rel. GEORGE F. COMSTOCK, Appellant, *v.* THE MAYOR, etc., of the City of Syracuse, Respondent.

(Submitted June 16, 1891; decided October 6, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 3, 1891, which reversed an order of Special Term granting a writ of peremptory mandamus.

Charles H. Peck for appellant, and *George F. Comstock*, appellant in person.

C. L. Stone for respondent.

Agree to affirm on opinion below.
All concur.
Order affirmed.

EUGENIA A. PENFIELD, Respondent, *v.* NEW YORK AND MOUNT VERNON WATER COMPANY, Appellant.

(Submitted June 17, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 20, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Milo J. White for appellant.

Norman A. Lawlor for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

SIRAGAN S. COSTIKYAN, as Administrator, etc., Respondent, *v.* THE ROME, WATERTOWN AND OGDENSBURG RAILROAD COMPANY, Appellant.

(Submitted June 17, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 23, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Edmund B. Wynn for appellant.

Abram & Niles C. Bartholomew for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

POSTAL TELEGRAPH CABLE COMPANY, Appellant, *v.* HUGH J. GRANT, Sheriff, etc., Respondent.

(Argued June 17, 1891, decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 24, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Andrew Wesley Kent for appellant.

Charles F. Tabor, Attorney-General, for respondent.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

DAVID D. WEAVER, an Infant, by Guardian, etc., Respondent, *v.* JOHN N. BULLIS, Appellant.

(Submitted June 16, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury, and affirmed an order denying a motion for a new trial.

Daniel W. Guernsey for appellant.

Hackett & Williams for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

STEWART H. PINK, Respondent, *v.* WILLIAM S. CHURCH, as Administrator, etc., Appellant.

(Argued June 18, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

Allison Butts for appellant.

Stephen G. Guernsey for respondent.

Agree to affirm: no opinion.
All concur.
Judgment affirmed.

JULIEN T. DAVIES, as Receiver, etc., Respondent, *v.* THE NEW YORK CONCERT COMPANY (Limited), Appellant.

(Argued June 18, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 13, 1891, which overruled defendant's exceptions and ordered judgment in favor of plaintiff upon a verdict directed by the court, and denied a motion for a new trial.

William H. Arnoux for appellant.

William B. Hornblower for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

KATIE COOK, as Administratrix, etc., Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued June 18, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judical department, entered upon an order made February 4, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

John D. Wendell for appellant.

George S. Klock for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

RUFUS L. TODD, as Executor, etc., Appellant, *v.* THE UNION DIME SAVINGS INSTITUTION, of the City of New York, Respondent.

A purchaser of real estate is not entitled to demand a title absolutely free from all suspicion or possible defect. He may claim simply a marketable title, that is one which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to and ought to accept.

Reported on a former appeal, 118 N. Y. 327.

(Argued June 19, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 17, 1891, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The following is the opinion in full:

"This action was brought to recover money paid by the plaintiff's testatrix upon the purchase-price of land in the city of New York, on the ground of a defect in the defendant's title. The land formerly belonged to Mrs. Ferris, and in December, 1870, she conveyed it to Griffith Rowe, and the title came from him to the defendant through sundry intermediate conveyances. The only defect in the title alleged is that the deed from Mrs. Ferris was shown by the record in the register's office to have been at the time of the record without seal. The deed appears to have been lost, and it was not produced at the time of the attempt to pass the title, or at the trial.

"The action has been twice tried. Upon the first trial the plaintiff recovered judgment, which was reversed in the second division of this court (118 N. Y. 337). The action was again tried, and Judge BARRETT, who presided at the trial said in his opinion, that 'the testimony is rather stronger in support of the defendant's position with regard to the seal upon the deed in question than it was upon the first trial;' and Judge

VAN BRUNT, upon the last appeal to the General Term, said: 'The facts are substantially the same as on the previous trial,' and so we think.

"We cannot review the decision of the second division of this court. What was there decided is the law of this case. The main facts are stated in the opinion of BRADLEY, J., there written, and they need not be restated here. He held that there was no evidence whatever that the deed of Mrs. Ferris was without seal when it was delivered to Mr. Rowe, and on that ground he reached the conclusion that the judgment ought to be reversed.

"Upon the first trial, Mr. Arnold, who was counsel for the defendant at the time it made a loan upon the property, about three years after the deed to Rowe, testified that, finding that the record disclosed that the deed was, at the time it was recorded, without a seal, he sought for and obtained the deed and found that there was a seal thereon; that he discovered nothing on the deed indicating that the seal had been placed there subsequently to the delivery of the deed; that he then caused the deed to be again recorded with the seal thereon, and that he then passed the title. His evidence, when properly read and understood, was substantially the same on the last trial. He and other witnesses testified that when a deed was left at the register's office, it was first examined to see if it was in proper form, properly executed, acknowledged and sealed; that if there was no seal, a blue pencil mark, not easily erased, was drawn over the place where the seal should be, and the words 'no seal' were written with the same pencil upon the deed, and that the parties interested w e notified of the defect; that if the deed was found to be in proper form and properly executed, it was placed upon file to await its turn for record; that it happened sometimes that before the record the seal would rub or fall off and that when it came to be recorded the recording clerk finding no seal, would, in the record, instead of the letters 'L. S.,' place a dash.

"The original record of the deed to Rowe was found with this dash, indicating that at the time of the record there was no seal upon the deed. Arnold testified that when he examined the record, he found the dash instead of the letters 'L. S.,' and

that he refused then to pass the title for his client, the defendant; that he required the production of the original deed that he might see whether there was some mistake in recording it and whether there was a seal upon it, and that the deed was found and produced. Upon the first trial, he testified that there was a seal upon it, and that he then caused it to be again recorded, and then passed the title. There is not in this record, in his evidence, the least indication that upon this vital point there was any change in his evidence, that his memory had in any way been refreshed, or that there was any inconsistency whatever between his evidence upon the two trials. On the contrary, the trial judge who was familiar with his evidence upon the first trial, stated in his opinion that the testimony for the defendant as to seal, was stronger than it was upon the first trial. Yet there was either some confusion in his evidence upon the last trial, or it was improperly and carelessly reduced to writing by the stenographer. It can be so read now as to show that when he obtained the deed he found that there was no seal upon it, and no indication that there had ever been a seal upon it, and yet, if we read it in that way we have the strange inconsistency that he first refused to pass the title because of the indication in the record of the absence of the seal, and that upon the production of the deed without any seal, he at once became satisfied with the title and passed it. It is clear that the evidence should not be so read. He testified: 'They then produced to me the original deed of Catharine A. Ferris, which I recognized as the original deed because it had at the bottom the statement of the recording, and it was signed by Catharine A. Ferris, and there was no seal on it, and not the slightest indication of any kind that it ever had been there. There was nothing whatever upon the deed in blue pencil, a mark or dash of no seal, or anything to indicate there was any defect. I would not have taken it without a reacknowledgment, if there had been. There was no impression to show that there had been any. There was Catharine A. Ferris' signature there. I then said this will have to be recorded.' On his cross-examination he testified: 'There was no 'L. S.' there, and because there was no 'L. S.' there, I demanded another deed, or the production of the

original deed. I told him I would not pass the title unless there was a deed produced to me from Catharine A. Ferris, either the original of that deed which I found on record without a seal, which would show there was a seal upon it, or a new deed which would supply the place of the deed which was recorded, in order to pass the title. I merely stated those were my objections to the title. I will not pass this unless certain things will be supplied. I cannot recollect who produced the deed. It was produced before I passed the title. I think it was produced in a few days after I made my objections. I scrutinized the deed very carefuly. I examined it specially. I looked at the seal to see if there was any indication that a seal had been there. There was not the slightest indication.' Now what did the witness mean to testify that he discovered as to the seal when he examined the deed? Clearly that he did not find the words 'no seal' upon the deed written with a blue pencil, and did not find any blue pencil marks upon it, or any indication that these words or the blue marks had ever been upon it. He found the seal there, and no indication that any seal had been there before, and he became satisfied that the seal he then saw was the original seal which had been overlooked, or by mistake omitted in the recording. Any other construction of the evidence would convict the witness of the greatest folly and misconduct in passing the title for a large loan, and also of the most palpable contradiction, without any explanation of his evidence upon the first trial upon the turning point in the case.

"We are, therefore, of opinion that there is no material variation in the evidence as to the seal from that given upon the first trial, and that the decision upon the former appeal to this court should control us.

"Upon the first appeal, the case came here with a finding against the title. It now comes here with a finding on all the evidence in favor of the title. A purchaser is not entitled to demand a title absolutely free from all suspicion or possible defect. He may claim a marketable title, and that means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which

business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.

"The judgment should be affirmed, with costs."

Edward S. Rapallo for appellants.

Wm. H. Arnoux for respondent.

EARL, J., reads for affirmance.
All concur.
Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* CASSIUS C. CORNER, Appellant.

(Argued June 19, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 3, 1891, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

Frederick Collin for appellant.

Charles F. Tabor, *Attorney-General*, and *Erastus F. Babcock* for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

In the Matter of the Probate of the Last Will and Testament of ANN FORBES, Deceased.

(Submitted June 19, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1891, which affirmed a decree of the Surrogate's Court of Kings county admitting to probate the will of Ann Forbes, deceased.

Wm. J. Gaynor for appellant.

Chas. J. Patterson for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

128 641
141 501

ABEL A. CROSBY et al., Respondents, *v.* THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, Appellant.

Upon the trial of an action for the conversion of a quantity of lumber, which plaintiffs claimed had been sold by defendant to G. & E. H., their assignors, defendant claimed that it was the intention and agreement of the parties that it should retain the title to the lumber until it had been used in the construction of two boats which G. & E. H. had contracted to build for it. The plaintiffs offered in evidence an order addressed to defendant's agent for the lumber; also a bill therefor sent by defendant, in which G. & E. H. were specified as debtors to defendant for the lumber, the items of which were stated, with the prices. Defendant then offered to show by its agent, who sent the bill, that it was sent merely as a memorandum of the value of the lumber, and to notify G. & E. H. for what amount they would be required to account on the settlement of the boat contract. This offer was overruled and the evidence excluded. *Held*, error.

(Argued June 22, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 4, 1891, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

This action was brought to recover the value of certain lumber of which plaintiffs claimed to be the absolute owners.

The following is the opinion in full:

"The judgment of nonsuit rendered on the first trial of this action was reversed by this court on the ground that there was some evidence given on the trial tending to show that there was an absolute sale of the lumber to the Harndens. (119 N. Y. 334.)

"On the second trial the plaintiffs recovered a verdict and the judgment thereon was affirmed by the General Term, and this appeal is from the judgment of affirmance.

"The issue presented to the jury was whether the transaction between the defendant and the Harndens was a purchase

and sale of the lumber out and out, or only a conditional sale or bailment. The claim on the part of the defendant is that it was the intention of the parties that the title to the lumber should remain in the defendant until the lumber had been used by the Harndens in the construction of the boats. The clear preponderance of evidence is in favor of this contention, but we should not feel at liberty to disturb the verdict upon this issue, provided there were no valid exceptions to rulings on evidence taken by the defendant. The evidence scarcely leaves room to doubt that the defendant furnished and the Harndens received the lumber on the understanding that it was to be used only in the construction of the two boats which the Harndens had contracted to build for the defendant. It is also quite evident that the defendant was to get the value of the lumber by deducting it from the purchase-price of the boats.

"The vital question was, in whom was the title to the lumber after delivery and before it was used by the Harndens for the purpose for which it was furnished. The plaintiffs, in order to establish that there was an absolute sale of the lumber to the Harndens, introduced an order in writing signed by the Harndens, addressed to the agent of the defendant, dated November 21, 1882, commencing with the words, 'please send us,' followed by a specification of various kinds and qualities of lumber, and closing with the words: 'Please send by William Steven if possible and oblige Geo. & E. Harnden.' The lumber ordered was sent by the defendant, and after shipment the agent of the defendant sent by mail to the Harndens a bill, partly written and partly printed, the same being made out on one of the blank bill-heads used by the defendant. The bill, after the date, reads: 'Messrs. G. & E. Harndens: To the Delaware and Hudson Canal Co., Dr.' and then follows a list of the lumber and the prices of the various kinds. The plaintiffs introduced the order and bill as evidence that the transaction was a purchase and sale. It will be noticed that the order was consistent with either view of the transaction, that taken by the plaintiffs or that insisted upon by the defendant. The bill, while it might imply a purchase and sale of the lumber in the usual course, is also consistent with the transaction as claimed by the defendant, viz., a conditional sale

at the prices named, the object of the bill being merely to advise the Harndens of the amount and qualities of the lumber shipped and the prices which would be charged against the boats on the lumber being used therefor.

"The defendant's counsel offered to show by the agent who sent the bill that it was sent merely as a memorandum of the value of the lumber, and to notify the Harndens for what amount they would be required to account on the settlement of the boat contract. The court overruled the offer and excluded the evidence. We think the evidence was competent.

"The bill was admissible in behalf of the plaintiff as an admission. It was not made contemporaneously with the contract, but after the order had been made and the lumber supplied. The parol explanation of the purpose for which the bill was sent was not an attempt to alter or vary a written contract. The bill sent after the contract was made had an equivocal significance at least with the parol explanation offered; it would bear an interpretation consistent with the transaction as claimed by the defendant. It was competent to show the purpose for which the bill was sent, to explain its real meaning and significance. If in fact there was a present sale of the lumber made out by other and undisputed evidence, then the purpose of sending the bill would be immaterial. But the plaintiff having used the bill as an admission of a prior sale, the explanation should have been allowed for the consideration of the jury. Even if the bill was made out concurrently with the contract and was part of the *res gestæ*, it is not a writing having such a complete and decisive character as would render the proposed evidence inadmissible. (See *Hazard* v. *Loring*, 10 Cush. 267.)

"For the error excluding the evidence the judgment should be reversed and a new trial ordered."

F. L. Westbrook for appellant.

S. L. Stebbins for respondents.

ANDREWS, J., reads for reversal.
All concur.
Judgment reversed.

JESSE BILLINGS, Respondent, *v.* THE FITCHBURG RAILROAD COMPANY, Appellant.

(Argued June 23, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 9, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict.

T. F. Hamilton for appellant.

Joseph D. Baucus for respondent.

Agree to affirm: no opinion.
All concur.
Judgment affirmed.

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128 b 644
154 725

128 b 644
158 44

EDGAR T. BRACKETT, as Administrator, etc., Appellant, *v.* CHESTER GRISWOLD, Respondent.

Where an action had been repeatedly tried, and upon the last trial was retried on the same evidence given on the previous trials, which was read from the former records, and there appeared no probability that the case could be changed in any material aspect on another trial, *held*, that the General Term, on reversal of a judgment in plaintiff's favor, had power to dismiss the complaint.

(Argued June 23, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 4, 1891, which reversed a judgment in favor of plaintiff entered upon a verdict, and dismissed the complaint on the merits.

This action was brought by plaintiff, as administrator of Samuel Bonnell, deceased, against defendant, who was one of the directors of the Iron Mountain Company of Lake Champlain, to recover the amount of certain notes purchased by said intestate on the ground of an alleged fraudulent conspiracy on the part of said directors, whereby the public, by means of false representations as to the financial condition of said corporation, were induced to purchase its securities.

The following is the opinion in full:

"The third count in the complaint, upon which alone the case was submitted to the jury, alleges a conspiracy between the original defendants in the action, including the defendant Chester Griswold, to organize a sham corporation, the Iron Mountain Company of Lake Champlain, with a nominal capital of $2,000,000, to defraud the public who might deal with it and give it credit, and that in pursuance of the conspiracy they, among other things, falsely represented that the stock had been fully paid in, and resorted to other fraudulent devices specifically set forth in the complaint to give credit to the company, and that the plaintiff's intestate, relying upon and being deceived by the false representations and pretenses of the defendants, purchased the notes, believing the company to be solvent and responsible, whereas it was at all times insolvent and had no property available for the payment of its debts.

"On the fifth trial of the action, a verdict was rendered for the plaintiff on the third count, which was subsequently reversed by this court (112 N. Y. 454), on the ground that assuming the existence of the conspiracy alleged, and that the defendant Chester Griswold was a party to it, yet as the plaintiff's intestate had no knowledge of and did not rely upon any acts or representions of the alleged conspirators in purchasing the notes of the company, he was not defrauded thereby and the action could not be maintained. Pursuant to the order of the court, the case went back for a new trial. The court, on the next trial, again submitted the case to the jury on a view not taken on any former trial, viz.: that if the jury should find that Ellis, the treasurer of the company, was a co-conspirator with the persons originally named as conspirators, his representations made to Tuthill, the agent of Bonnell (plaintiff's intestate), and reported to him, on the strength of which Bonnell purchased the notes, that "the company was fully responsible; that the notes were good and would be promptly paid at maturity," was in law the representations of all the conspirators, and that the defendant Chester Griswold was responsible therefor to the same extent as if it had been made by him personally. The jury upon this new view of the case found again for the plaintiff. Their verdict has substantially

established two facts, *first*, the original conspiracy as alleged, and *second*, that Ellis was a co-conspirator and in aid of the conspiracy made the false representations to Tuthill; that the company was solvent and responsible.

"The General Term reversed the judgment entered on the verdict on the ground that there was no evidence authorizing the submission to the jury of the question whether Ellis was a co-conspirator in the scheme alleged in the complaint, and that there was no ground upon which the defendant could be held bound by the representations made by Ellis to Tuthill. We concur with the opinion of the General Term.

"The conclusion of the jury that the defendant Chester Griswold was a party to any conspiracy to defraud the public through the organization of the Iron Mountain Company, is to say the least, founded upon vague and unsatisfactory evidence. But assuming that upon the evidence this was a question for the jury, we think the evidence was wholly insufficient to justify a finding that Ellis was a party to the conspiracy, and it is only on the assumption of this fact that there can be any pretence that his declarations to Tuthill were admissible against the defendant.

"In our opinion on the former appeal, the admissibility of the declarations of Ellis were considered, and we then said: 'It is undoubtedly true that Bonnell took the notes on the assurance of the 'Birmingham Iron Foundry' and of Ellis, the treasurer of the 'Iron Mountain Company,' that the company was good and that the notes would be promptly paid at maturity. But neither was the 'Birmingham Iron Foundry' nor Ellis, the agent of the defendant, nor were they authorized by him to make any representations to Bonnell, and the statements did not bind him, nor was he responsible for them.'

"It is true that the claim that Ellis was a co-conspirator had not at that time been made. That theory was first advanced when the case went back for the fifth trial. The only ground for the suggestion that Ellis was a co-conspirator arises from the fact that he was treasurer of the company, and that when he represented to Bonnell's agent that the company was good, he had executed as treasurer, pursuant to the direction of the board of directors, corporate bonds to the amount of $400,000,

and that certain drafts drawn at the works had gone to protest. There is no evidence whatever that Ellis supposed the company to be in fact insolvent when the representation was made, or that his representation was not made in the full belief of its truth. Ellis, when he was appointed treasurer, was cashier of a bank in New York city, where the financial business of the company was to be carried on. His salary was fixed at $1,000 a year. He was neither a director nor stockholder in the company, and so far as appears, he had no knowledge of any of the alleged fraudulent purposes or acts of the promoters of the company. They were well-known men, of large wealth and business experience, and of high standing in the community.

"The issue of bonds by a corporation in the initiation of its business was not inconsistent with solvency, and the reason why some of the drafts of the company went to protest does not distinctly appear. The agent who drew them testified: 'I was requested to draw at so long a time, and so I account for it.' The want of funds in the early months of the enterprise, before the development of the mines had proceeded to any extent, was not a very significant fact, and the treasurer might well have supposed that it indicated no permanent embarrassment. The representation made by Ellis to Tuthill was not made to secure present credit for the company. The notes had already been given and accepted by 'The Birmingham Iron Foundry,' the original creditor, and the inquiry made of the treasurer was by a party contemplating taking them upon a dealing between him and the holder of the notes. The facts disclosed are consistent with the good faith of Ellis, and in the most favorable view for the plaintiff, they afford only a suspicion of fraudulent intention on his part in making the representation claimed. So far as appears, he had no personal interest to subserve. Upon the evidence, the finding that Ellis was acting in concert with other parties in the scheme to create a fraudulent corporation cannot be sustained. His declarations, therefore, to Tuthill, not made in pursuance of any duty or authority as treasurer, and not previously authorized or subsequently sanctioned by the defendant, were inadmissible. This conclusion removes the only prop upon which

the verdict rested, and we think the judgment founded thereon was properly reversed.

"The General Term in connection with the reversal dismissed the complaint on the merits. It is claimed that it was erroneous for the General Term to render final judgment against the plaintiff and that it should have ordered a new trial. We think the General Term had power under the circumstances to make the order. (Code Civ. Pro. § 1317.) It is extremely improbable that the case can be changed in any material aspect on a new trial. The case was retried on the last trial on the same evidence given on the previous trials, the evidence being read from the former records. Bonnell and Ellis are both dead. The action was commenced in 1873. Six trials have been had and every phase of the controversy has been explored with the utmost diligence by the counsel for the parties. They have substantially conceded by the course of the later trials, that all the pertinent evidence available has been procured. We do not say that no wrong was committed by the promoters of the Iron Mountain Company. But the facts bearing upon the defendant's connection therewith, and the circumstances under which Bonnell took the notes, which caused his loss, as presented by the record, constitute no cause of action, we think, against the present defendant. If there are any reasons why the plaintiff should have another trial, they can be presented to the Supreme Court on an application to modify its order, that being the proper tribunal to consider and determine such an application. (See *Baker* v. *Lever*, 5 Hun, 114; Affirmed, 67 N. Y. 304; *King* v. *Barnes*, 109 id. 267.)

"The judgment should be affirmed."

Richard L. Hand for appellant.

William C. Holbrook for respondent.

ANDREWS, J., reads for affirmance.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* EDWARD J. RICE, Appellant.

(Argued June 23, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made February 2, 1891, which reversed a judgment entered upon an order of the Oyer and Terminer of the county of Monroe sustaining a demurrer to the indictment therein.

John Van Voorhis for appellant.

George A. Benton for respondent.

Agree to affirm on opinion below.
All concur, except RUGER, Ch. J., not voting.
Judgment affirmed.

WILLIAM D. BURRILL, Appellant, *v.* M. SOPHIA BECKER, as Administratrix, etc., Respondent.

(Submitted June 24, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 3, 1891, which affirmed a judgment in favor of defendant entered upon the report of a referee.

Waters & McLennan for appellant.

S. J. Barrows for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

JOHN DOBSON et al., Respondents, *v.* LUCIUS D. WARNER, Appellant.

(Argued June 24, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order

made June 4, 1890, which affirmed a judgment in favor of the plaintiffs entered upon the report of a referee.

C. R. Lockwood for appellant.

Devoe P. Hodson for respondents.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

THOMAS COSTELLO, Appellant, *v.* GEORGE B. EDDY, Respondent.

(Argued June 25, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 26, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit.

C. H. Sturges for appellant.

C. S. Lester for respondent.

Agree to affirm on opinion of MAYHAM, J., below.
All concur.
Judgment affirmed.

ANNA R. HARLOW, Respondent, *v.* ABNER MILLS, Appellant.

(Argued June 25, 1891; decided October 6, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 8, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

A. S. Cassidy for appellant.

William Vananee for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

JULIA T. MONROE, Respondent, *v.* JACOB CROUSE, Impleaded, etc., Appellant.

(Argued and decided October 13, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 5, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

Waters & McLennan for appellant.

George F. Comstock for respondent.

Agree to dismiss appeal on argument; no opinion.
All concur.
Appeal dismissed.

THE PEOPLE ex rel. ISAAC P. MARTIN, Appellant, *v.* EDWARD GILON et al., as and Composing the Board of Assessors of the City of New York, Respondent.

(Argued October 5, 1891; decided October 13, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made April 9, 1891, which dismissed a writ of certiorari to review proceedings of the board of assessors of the city of New York.

James A. Deering for appellant.

David J. Dean for respondent.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

WILLIAM P. CHASE, Respondent, *v.* FLETCHER A. DEFENDORF as Supervisor, etc., Appellant.

THOMAS L. HULBERT, Respondent, *v.* Same Appellant.

The supervisor of a town has power, notwithstanding the direction of a town meeting, to refuse or neglect to appeal from a judgment rendered against him as such officer, and an appeal if brought is still under his and his attorney's control, and they may withdraw the same.

Where a supervisor, after service of notice of appeal, withdrew the same upon receipt of a stipulation extending time to appeal and subsequently entered into an agreement for a compromise and settlement of the action and, thereupon, an order was entered upon stipulation dismissing the appeal, *held*, that while the court below might give relief against the stipulations and order, defendant was not entitled thereto, as matter of law, but it rested in the discretion of the court; and that the exercise of this discretion was not reviewable here.

Reported below, 58 Hun, 585.

(Argued October 6, 1891; decided October 13, 1891.)

APPEALS from orders of the General Term of the Supreme Court in the fifth judicial department, made the first Tuesday of January, 1891, which reversed in each of the above-entitled actions an order of Special Term vacating an order setting aside a notice of appeal.

These actions were brought to recover the value of legal services rendered by plaintiffs under contracts entered into by them with a former supervisor of the town of Perington, defendant's predecessor in office, in several actions brought against him in his official capacity.

Judgments were recovered against the defendant in said actions and at a special town meeting subsequently held he was authorized to appeal to the General Term. He caused a notice of appeal to be filed and served, but afterwards caused it to be withdrawn, and upon the request of many citizens, but without the authority of the taxpayers of the town as such, he settled the action by an agreement to pay each plaintiff a sum less than the judgment. The resolution of the special town meeting, above referred to, was the only action that had been taken by the town at the time of the agreement of settlement. At the annual town meeting, subsequently held, the action of the special town meeting was ratified and

approved. The plaintiff in each of these actions knew of the resolution of the special town meeting before making the agreement for settlement.

Further facts are stated in the opinion, which is given in full:

"We will assume that the town meetings had power to give the supervisor directions as to the defenses of the actions pending against him, and yet we think the order of the General Term is not reviewable here.

"After the special town meeting held January 13, 1890, on the fifteenth of January notices of appeal were served by the defendant. Afterward, on the same day, to give opportunity to negotiate settlements, the notices of appeal were withdrawn and the plaintiffs by stipulation extended the time to appeal to January thirtieth. On the twenty-ninth of January notices of appeal were again served, and again on the same day withdrawn, the plaintiffs by stipulation extending the time to appeal to February fifth. On the third day of February, terms of settlement were agreed upon and notices of appeal were not again served, and subsequently in March, 1890, in pursuance of the stipulations given by the defendant, the orders were entered at both the Special and General Terms dismissing the appeals. These orders were supposed to be necessary because notices of appeal had been filed with the county clerk.

"The resolutions of the town meetings could have no effect unless acted upon. The supervisor could still refuse or neglect to appeal, and the appeals, if brought, would still be under the control of the supervisor and his attorneys, to be managed by them in all matters of practice according to their sense of duty and best judgment. If they had neglected to bring appeals, the judgments would have been final. They could withdraw the notices of appeal and take the stipulations extending the time to appeal. All this was matter of practice, and if within the time limited no notices of appeal were again served, the cases would stand as they would if no notices had been served at any time. Therefore, when the orders were entered dismissing the appeals, no effectual appeals had been taken. The court below could have given relief against the stipulations and orders. But the defendant was not absolutely, as matter of law, entitled to such relief. It rested in the dis-

cretion of the court below whether it would grant such relief, and the exercise of that decision is not subject to review here.

"But still further, no exceptions had been filed to the report of the referee, and no case had been made as required by the rules and practice of the court, and the time had passed for doing these things at the time when the orders dismissing the appeals were entered. It would, therefore, be fruitless to allow the appeals to be restored, and whether, under such circumstances, the court below would restore the appeals and allow exceptions to be filed and a case made, certainly rested in discretion not reviewable here.

"The appeal in each case should, therefore, be dismissed, with costs."

William Martin Jones for appellant.

Walter S. Hubbell for respondents.

Per Curiam opinion for dismissal of appeals.
All concur.
Appeals dismissed.

THE PEOPLE ex rel. ANNA MARIA DEAN, Respondent, *v.* EDWARD GILON et al., as and Composing the Board of Assessors of the City of New York, Appellants.

(Argued October 5, 1891; decided October 13, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 11, 1891, which reversed on certiorari, proceedings of the assessors in the matter of closing Kings Bridge road between One Hundred and Thirty-fifth and One Hundred and Fifty-fifth streets in the city of New York.

D. J. Dean for appellants.

James A. Deering for respondent.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

LOUIS STONO, Appellant, *v.* HERRMANN WEILLER, Respondent.

Plaintiff's complaint set forth a cause of action for malicious prosecution and alleged that plaintiff had executed a release thereof, which release was extorted by threats and under duress. The relief asked was that the release be canceled and damages awarded for the malicious prosecution. The case came up for trial at Circuit, and upon plaintiff's opening, the court upon its own motion directed the withdrawal of a juror and the transfer of the cause to the Special Term for trial. The case was tried there, neither party objecting, and no demand for a jury trial having been made by plaintiff to determine any of the issues. At the close of the evidence the complaint was dismissed. *Held*, that it was proper to send the case for trial to the Special Term, the equitable relief sought being an indispensable condition to the existence of the legal right of action; that plaintiff, having proceeded to trial without objection, or request for the intervention of a jury, could not complain here of the tribunal to whose jurisdiction he had submitted.

It appeared that the release was executed after bail had been given by plaintiff on his arrest and against the advice of his counsel. *Held*, that a finding that plaintiff executed said release freely and willingly and without coercion or fear, was justified.

(Submitted October 8, 1891; decided October 13, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 26, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion, which is given in full.

"The complaint of the plaintiff stated a cause of action for malicious prosecution, but further averred the execution by the plaintiff of a release which discharged the cause of action pleaded as well as all others. The complaint then proceeded to assail the release, and, alleging that its execution was extorted by threats and under duress, asked that it be canceled and annulled, and then that damages be awarded for the malicious prosecution. The cause of action pleaded was thus equitable in its character. There could be no enforcement of the legal right except upon condition that equity should remove the barrier raised by the release. Upon this complaint the case came to trial at a Circuit and before a jury. Upon the plain-

tiff's opening, the character of the complaint was disclosed and the court at once, upon its own motion, directed the withdrawal of a juror and the transfer of the cause to the Special Term for trial. At the Special Term the case was tried. Neither party objected to the tribunal, and the plaintiff made no demand for a jury to determine any of the issues involved. He neither claimed such a trial as a matter of right, nor invoked the discretion which might have submitted one of the issues to a jury. (Code, § 971.) At the close of the evidence his complaint was dismissed. The General Term affirmed the judgment and the plaintiff appeals to this court.

"So far as he complains of the action of the court at the Circuit, founding his argument upon an exception taken at that time, we think he is wrong for two reasons. It was entirely proper to send the action to the Special Term, because the equitable relief sought was an indispensable condition to the existence of the legal right of action. But if this fact had been otherwise, the plaintiff could still have demanded a jury trial of the legal issue, and upon such demand might have obtained it. Proceeding to trial before the court without objection, and making no request for the intervention of a jury, he cannot now complain of the tribunal to whose jurisdiction he submitted.

"The remaining question argued is settled by the findings of fact. The third is 'that the said plaintiff executed the said release freely and willingly, and not by any coercion or fear, and had the benefit and advice of his counsel prior to the execution thereof.' It may be admitted that the circumstances of an arrest and of the prosecutor's threats rendered possible an inference of duress, but the further facts that the release was executed after bail had been given, and against the advice of the party's own counsel, and when a trial was open to the accused and he declared his innocence, tend to the inference that he acted freely and voluntarily, and chose to settle rather than face the litigation. The finding of the court, therefore, has foundation in the facts and must govern our conclusion. Upon that finding the release was valid and effectual, and the complaint was properly dismissed.

"The judgment should be affirmed, with costs."

A. B. Moore for appellant.

Samuel B. Hamburger for respondent.

FINCH, J., reads for affirmance.
All concur.
Judgment affirmed.

JULIA A. HURLEY, Appellant, *v.* GODFREY R. MARTINE et al., Respondents.

(Argued October 5, 1891; decided October 13, 1891.)

MOTION to dismiss appeal from a judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 31, 1889, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit.

Louis M. Brown and *Robert Imrie* for motion.

Martin L. Townsend opposed.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

PEOPLE ex rel. CHARLES H. WILLSON, Appellant, *v.* THE BOARD OF TRUSTEES OF THE VILLAGE OF MOUNT VERNON, Respondent.

(Submitted October 5, 1891; decided October 20, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made the second Monday of February, 1891, which reversed an order of Special Term, granting a motion by the relator for a peremptory writ of mandamus.

Close & Robertson for appellant.

Norman A. Lawlor for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

In the Matter of the Application of ELIZA W. CLARKE, as Administratrix, etc., to Mortgage Real Estate of DAVID CLARKE, Deceased.

(Argued October 5, 1891; decided October 20, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made April 16, 1891, which reversed an order of Special Term, granting the petition herein.

C. M. Williams for appellant.

M. T. Dunmore for respondent.

Agree to affirm on opinion below.
All concur.
Order affirmed.

MARY KIEFER, as Administratrix, etc., Respondent, *v.* THE GRAND TRUNK RAILWAY COMPANY OF CANADA, Appellant.

(Argued October 5, 1891; decided October 20, 1891.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made January 6, 1891, which reversed an order of Special Term, directing the payment of certain moneys, staying plaintiff's proceedings, etc.

George F. Brownell for appellant.

J. W. Russell for respondent.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

JAMES POWERS, as Administrator, etc., Appellant, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

(Argued October 6, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 28, 1891, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Circuit.

Louis Marshall for appellant.

M. M. Waters for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

JOHN J. QUINLAN, Respondent, *v.* EMILY A. STRATTON et al., Appellants.

(Argued October 12, 1891; decided October 20, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 12, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action for the foreclosure of a mortgage.

The following is the opinion in full:

"The plaintiff established his cause of action so far as it asserted a right to judgment of foreclosure. That the defendant Emily A. Stratton borrowed two thousand dollars of her mother, Emily Stratton, and executed the bond and mortgage in controversy as security for the loan; that it was assigned by the mortgagee to Mrs. Currie, who assigned it to the present plaintiff; and that it was due and payable at the date of the commencement of this action; are all facts fully proved and

in no respect the subject of doubt or contradiction. So far the right of the plaintiff to a judgment of foreclosure was put beyond dispute.

"But he sought additional and further relief, and made the defendant Judson a party for that purpose. There was a prior mortgage on the same premises executed by Emily A. Stratton to one Hicks, by him assigned to Fitch, upon whose death it passed to his wife as executrix; while in her ownership was sued and the action carried to a judgment of foreclosure; by her was assigned to Joseph Fitch, Jr., by whom both were assigned to the defendant Judson. The amount then due upon the judgment, and which Judson paid, was two thousand and fifteen dollars and thirty-three cents. He testified to that fact himself. This prior lien the plaintiff sought to destroy as such and postpone to his own mortgage by proof that the consideration of the latter was advanced to pay off the former under an agreement that *pro tanto* it should take the place of the prior lien. The proofs indicated that some of the money borrowed of the mother was applied by the daughter upon the Hick's mortgage under an agreement like that alleged, but before the purchase by Judson and without knowledge on his part. The purchase by him was made with his own money and so this effort of the plaintiff failed as against Judson. The court adjudged the validity and priority of his lien; awarded a foreclosure subject to that lien; and gave to the plaintiff a right of subrogation only upon paying it in full. Of this result the plaintiff does not complain and Judson cannot, for he is protected and not harmed by its provisions. The priority of his lien for its full amount is recognized and preserved. The plaintiff's foreclosure and sale can do him no harm, and the result is the same as if he had sold on his own judgment, and the plaintiff as subsequent mortgagee had bid in the property for more than the amount of Judson's lien in order to collect the second mortgage out of the surplus value. Judson has no possible ground of complaint unless he had other liens or rights which the judgment failed to recognize. He claims in his answer to have had them, but gave no proof of them on the trial and the same thing is true of the other appellant, the mortgagor. Each of them attempt to fasten a

counter-claim upon the mortgage in controversy while in the hands of Mrs. Currie; alleging a debt due from her to the mortgagor for more than the amount of the mortgage, but there is not the least evidence of any such debt. Judson also claims in his answer to have had other prior rights and liens but gave no proof of them.

"The appellants seek to overcome this difficulty in two ways. They say that the answers are in evidence, and their allegations must be taken as true. They were not put in evidence at all. There is in the case no trace of any such fact, nor of any use of admissions so connected with other allegations as to be inseparable.

"But an explanation of this lack of proof is made on the part of Judson. Among the papers printed is what purports to be an extract from the clerk's minutes, which reads, 'Judgment for pl'ff, with costs, and dismissing complaint as against defendant Judson.' This memorandum is dated March 14, 1887. It formed no proper part of the judgment-roll, and is not the decision actually made, for that bears date July 3, 1888, is signed with the initials of the trial judge, orders judgment of foreclosure and sale subject to the lien of Judson's mortgage, is followed by the formal findings and the judgment in accordance therewith. If the appellant Judson was misled or deceived by the court, so as to have deemed his proofs needless, his remedy, I think, was an application to open the case and be let in to make his further proofs. Instead of that, he seems to have proposed findings and filed exceptions with a perfect understanding that the action was not dismissed as to him.

"I can discover no error in the record which warrants a reversal, and the judgment should be affirmed, with costs."

Samuel W. Judson for appellants.

James D. Bell for respondent.

FINCH, J., reads for affirmance.
All concur.
Judgment affirmed.

128	662
151	584
128	662
170	1468

AGNES E. ABEL, as Executrix, etc., Respondent, *v.* THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, Appellant.

A railroad company is bound to guard its employes against negligence of co-employes, so far as it can, by the enactment and promulgation of reasonable rules in the management of its business, and the rule that the employe takes the risk of the business is subject to the qualification that the company perform this, as well as other duties, to protect the employe from unnecessary hazards while engaged in his work.

Upon the trial of an action to recover damages for alleged negligence causing the death of plaintiff's testator, a repairman in defendant's employ, who was killed while at work under a car, the negligence charged was the omission to promulgate proper rules for the protection of car repairers. The rules of other companies upon this subject were given in evidence, and the court charged in substance that the jury were to weigh the evidence and, in view of the rules adopted by different companies, determine whether defendant had discharged its duties, but that they were not to find a rule proper or improper because some other company had adopted or rejected it. *Held*, no error.

(Argued June 2, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 6, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action to recover damages for the negligent killing of Perry Abel, plaintiff's testator, who, while in the employ of defendant as a car repairer, was caught between two cars standing upon a side track for the purpose of being repaired, upon one of which he was working, which were pushed together by a switch engine.

Further facts are stated in the opinion, which is given in full.

"The judgment of nonsuit rendered on the first trial of this action was reversed by this court on the ground that the question of negligence in respect of the duty of the defendant to make and promulgate proper rules for the protection of car repairers, should have been submitted to the jury. (103 N. Y. 581.) The second trial resulted in a verdict for the plaintiff. This appeal is from the judgment on the verdict.

"The additional evidence given on the last trial on the subject of rules would not have justified the trial court in determining as a question of law that the defendant's duty in this respect had been performed. The company neither by its board of directors nor by any general officer or superintendent, ever enacted or published any rule for the special protection of car repairers, nor was any instruction, verbal or otherwise, ever given by any superior officer to their subordinates on the subject. Rule 63 of the general rules of the company was enacted primarily, as its language shows, to regulate the movement of ordinary trains and to prevent collisions, and had no reference to the switching of cars on the repair tracks. It stated what doubtless was generally understood by employes, that a red flag by day or a red lantern by night was a danger signal. But it gave no instructions for the protection of car repairers, either as to the duty of maintaining the signal while the car repairers were at work, or as to the persons by whom it might be removed. At Mechanicville, where the accident occurred, it seems to have been left to Cowen, the foreman of the repairers, and to Donnelly, the foreman of the switchmen, to regulate the matter in their discretion. Cowen testifies that he told his men that they were to work under the protection of a red flag, and that he designated Hickey and Patrick, who worked at the north end of the cars on the cripple track, and Dwyer and Wicks, who worked at the south end, to put a red flag in the draw-head of the outermost car at the respective ends, before going to work, and to protect the same, and also that he informed Donnelly and the brakemen that the repairmen worked under the protection of the red flag.

"Donnelly on the first trial testified substantially that the only rule he heard of was rule 63, and what the repairmen told him, viz.: that they worked under the protection of a red flag. It is evident that if this was the extent of the regulations on the subject, the repairmen had a very inadequate protection. If the red flag was put up and maintained, wherever the repairmen were at work, and the meaning of the signal was known by the switchmen, as it probably was, the repairmen would be protected, except as against the reckless or heedless conduct of the switchmen. But it was essential to the

efficiency of the rule that it should designate the persons authorized to remove the flag. It was shown that this was done by the rules of the New York Central Railroad, which provide that the repairmen alone should have power to remove the flag from cars on a repair track. The same rule was recommended in railroad manuals published before the occurrence of the accident in question. It is obvious that such or a similar regulation, which should place the duty and responsibility of removing the flag upon persons officially designated, was essential to the car repairers' protection. The rule that they should put up a red flag when they commenced work, unaccompanied by a rule prohibiting the brakemen or other employes from taking it down when they desired to remove cars from the cripple track, unless by the consent or direction of the repairmen engaged in repairing the cars, would leave the repairmen exposed to the danger of the mistake or negligence of the brakemen. If it was left for the brakemen to determine for themselves whether there were men engaged in repairing the cars, and whether the flag might be safely removed or not, and to act upon their judgment in removing it, the chances of accident would be greatly increased.

"It appears from the evidence that it was the common practice of both Donnelly and the brakemen to remove the flag when they supposed there was no one under the cars. On another occasion, a repairman came near being caught and injured in consequence of this practice.

"It is settled doctrine that a railroad company is bound to guard its employes against negligence of co-employes so far as it can, by the enactment and promulgation of reasonable rules in the management of its business.

"The rule that the servant takes the risks of the business is subject to the qualification that the master must exercise reasonable care to guard the servant while engaged in his duties, from unnecessary hazards, including hazards from negligence of co-employes. In the business of a railroad this duty is especially important in view of the dangers of the employment, and the serious consequence, likely to ensue from the negligence of co-employes.

"There can, we think, be no doubt that upon the evidence

given on the former trial, it was for the jury to say whether the defendant had discharged its duty toward the decedent. It had made no distinct rule for the protection of the repairmen while engaged in discharging their dangerous duties. It appears to have been left to subordinates in the yard to establish such rules as they thought reasonable. And as the case stood on the first trial there was no pretense that there was any regulation prohibiting the brakemen or any one else from removing the flag. On both trials it appeared that the flag was put up by the proper person (Hickey) before the repairmen commenced work, and that some one took it down and laid it on the ground while Abel (the deceased) was at work under one of the cars. The engine was backed down against the cars on the cripple track and Abel was caught between the cars in attempting to escape. It does not distinctly appear by whom the flag was taken down. The jury would have been justified in finding that it was done by one of the brakemen engaged in switching the cars, since it appears that this was a common practice. It undoubtedly was a negligent act, and unless the negligence of the company in omitting to enact and promulgate proper rules, co-operated with that of the co-employe, the defendant is not responsible.

"On the second trial, the testimony of Donnelly, the yardmaster, was greatly enlarged upon the point upon which the case turned. He supplemented his former testimony in important particulars, although on both trials the question of rules was the main question litigated. On his last examination he testified that he told his men they were not to interfere with the red flag unless told to take it down by the repairmen. He also testified that about half an hour before the accident he had directed his men to take cars from the cripple track and that after giving the order he went south along the cripple track. After he had given the order and observed the flag lying on the ground, and knowing that the repairmen were at work, he directed one of two repairmen (Grant or Wicks) to put the flag in its place again at the end of the north car. The man took up the flag and instead of putting it in its place, went toward the south end of the train with it, and he (Donnelly) took no further notice of the matter. The credibility of

this story was for the consideration of the jury. If true, it exhibits a recklessness on the part of Donnelly, for which there is no excuse. He permitted his order to back the engine (from the north) on to the cripple track, to remain unrevoked although he knew the flag was down, and that the repairmen were at work under the cars, and also that the man he had directed to replace the flag, had taken it in the opposite direction.

"We think upon the present case the same question of fact is presented as before, viz.: whether the defendant had either directly or through its subordinate officers, so regulated the conduct of its business at this place as to afford reasonable protection to the repairmen against accidents like the one in question. The employment of the defendant was a dangerous one. The movement of cars against those under which the repairmen were at work, was likely to result in serious injury. The lock switch was left open during the day, and no person was employed to notify the repairmen of the intended movement of the cars. It was especially important, therefore, that definite regulations should have been enacted by the company or those who represented it at this point. It was for the jury to determine whether the rule prevailing here provided both for the putting up of the danger signal and its removal, so as to protect the repairmen as far as reasonably could be done against the hazard of the negligence of co-employes.

"The defendant's counsel rely upon an exception taken to the charge. On the trial the judge admitted in evidence, against the objection of the defendant, the rules of other railroad companies, and among other rules those enacted for the protection of repairmen. In his charge the judge proceeded at considerable length to instruct the jury upon the obligation of the defendant to make and promulgate proper rules for the conduct of its business. He then referred to the fact that he had admitted the rules of other companies to be proved, 'not because it was the duty of this company to adopt the rules of any other company, but to better enable you to judge and determine in looking at the different rules that prevail, what is a reasonable and proper rule.' After some further remarks on this point the judge proceeded: 'I think rules might have

been suggested, not adopted by any company. You have a right to consider whether some rule which occurs to you, even though no company had adopted it, would have been a better rule and given better protection, and such a one as ought to have been adopted and maintained.' The defendant's counsel excepted to that part of the charge 'in relation to the jury determining what were proper rules, and they might conclude what rules should be.' If the charge is to be construed as leaving it to the jury to determine, irrespective of the evidence, what rules ought to have been adopted for the safety of the repairmen, and to find the one way or the other on the question of the defendant's negligence in conformity with a conclusion so reached, the charge was undoubtedly erroneous. But this is not the fair interpretation of the charge. The plain object of the court was to guard the jury against giving undue weight to the fact that more specific and, as the plaintiff's counsel contended, better rules had been adopted by other companies, than had been adopted by the defendant. This is very apparent from what follows the clause quoted: 'So that some other company has adopted a rule, you can't hold as matter of right that this company should have adopted it. If on examining the rules of other companies and those that prevailed here, you should think that one set of them was not a reasonable protection, and the other was, it would help you very much in getting at what ought to be done. That is the reason why this evidence was admitted.'

"The effect of the charge was that the jury were to weigh the evidence and in view of the rules adopted by different companies, determine whether the defendant had discharged its duty in the premises, and that they were not to find a rule proper or improper because some other company has adopted or rejected it. The court was endeavoring to aid the jury in weighing the evidence which related to the rule under which the defendant's business was conducted, and that adopted on the same subject by other companies. We do not think the jury were misled, and moreover the exception is too broad to raise the question now presented, as it covered all that the court had said as to the right of the jury to pass upon the question of proper rules (much of which was plainly proper), as

well as the part of the charge which related to the right to determine what rules should have been adopted.

"We have examined the other exceptions and there are none which calls for the reversal of the judgment.

"The judgment should be affirmed."

Edwin Young for appellant.

Jesse S. L'Amoreaux and *Nathaniel C. Moak* for respondent.

ANDREWS, J., reads for affirmance.

All concur, except EARL and GRAY, JJ., who dissent on the ground of error in charge, and PECKHAM, J., not sitting.

Judgment affirmed.

MARY FISHER, Impleaded, etc., Respondent, *v.* THE NIAGARA FIRE INSURANCE COMPANY, Appellant.

(Argued October 7, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 26, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict.

F. L. Westbrook for appellant.

D. M. De Witt for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ALEXANDER M. HUNTER, Respondent, *v.* CLARA L. WALKER et al., Appellants.

(Argued October 7, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

made the second Monday of September, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Isaac Fromme for appellants.

J. F. Harrison for respondent.

Agree to affirm on opinion below.
All concur, except ANDREWS, FINCH and GRAY, JJ., dissenting.
Judgment affirmed.

JOHN COPCUTT, Respondent, *v.* THE CITY OF YONKERS et al., Appellants.

(Argued October 8, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 12, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Joseph F. Daly for appellants.

Ralph E. Prime for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

In the Matter of the Application of the CITIZENS' WATER WORKS COMPANY, Appellant, *v.* DAVID PARRY et al., Respondents.

(Argued October 8, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1891, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

John M. Gardner for appellant.

A. H. F. Seeger for respondents.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

JOHN H. CHEEVER, Respondent, *v.* AVERY T. BROWN, as Assignee, etc., Appellant.

A creditor, seeking to recover of his debtor a balance alleged to be due, where the amount of the indebtedness to him is undisputed, should not be turned out of court because he does not show how much should be deducted therefrom by way of credit.

(Argued October 8, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 14, 1890, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion which is given in full:

"For some years prior to January 18, 1884, William H. Guion was a member of the firm of Williams & Guion. That firm originally consisted of John S. Williams, Stephen B. Guion and William H. Guion. Williams died in 1876, and the firm business was continued under the same firm name by the surviving partners until January 18, 1884, when William H., having became insolvent, made a general assignment for the benefit of his creditors to the defendant Brown, and the firm became thereby dissolved and went into liquidation. Subsequently in a creditor's suit William H. Guion was appointed receiver of the assets of the firm and acted as such. This action was brought by the plaintiff, a creditor of William H. Guion, on behalf of himself and other creditors against the defendant as assignee, for an accounting. A referee was appointed in the action to take proof of the claims against the assigned estate, and William H. Guion, as receiver of the firm, presented a claim of $106,937.82 for a balance of indebted-

ness due the firm from him individually. The referee disallowed the claim, and his report thereon has been confirmed.

"There was no conflict in the evidence before the referee, and no one, so far as the record discloses, made any contention then that the claim was not sufficiently proved. The referee, however, disallowed the claim on the ground that the balance due from William H. Guion to the firm was not rendered sufficiently certain. There was no dispute or doubt upon the evidence that Guion owed the firm at the time of his assignment for money loaned to him $205,186.05, besides interest, and upon general account, the general nature of which was explained in the evidence, the further sum of $338,270.21. Guion admitted that from the amount of these two sums and the interest there should be deducted on account of his profits in the firm the estimated sum of $464,000, and the balance claimed was thus reached. The referee rejected the claim, not because of any uncertainty in the amount of the two debit items, but on account of the uncertainty in the amount to be deducted for a credit. The firm books were put in evidence; the surviving bookkeepers were sworn; Guion gave his evidence, and there was proof of an adjustment of the firm accounts between the two surviving members of the firm as they existed at the date of the assignment. Here was apparently all the proof that could be given by living witnesses and the books of the firm, and if the evidence as to the amount to be deducted from the undisputed indebtedness of Guion to the firm was still uncertain, that furnishes no adequate reason for rejecting the whole claim. A creditor presenting a claim against his debtor should not be turned out of court because, the amount of the debt being undisputed, he does not show how much should be deducted therefrom by way of credits. Guion, in presenting this claim, represented the creditors of the firm, and the evidence showed *prima facie* that he owed a large amount to the firm at the time of his assignment. Those creditors are entitled to share with other creditors in the proceeds of the assigned estate, and who shall suffer if such other creditors are unable to show how much for credits shall be deducted from the undisputed sums for which Guion became indebted to the firm? Guion and the bookkeepers of

the firm arrived at the amount of credits as well as they could, using all the information within their reach. No suspicion attached to their methods, and, in the absence of better proof, we know of no reason why this evidence should not have been taken as the best attainable, and, therefore, satisfactory. With the books of the firm, the bookkeepers and Guion as witnesses, it cannot be impossible to reach with sufficient accuracy the true amount of the firm claim, and a further hearing and a more careful and searching examination of the evidence are due to the case.

"We are, therefore, of opinion that the orders of the General and Special Terms should be reversed, and the exceptions by William H. Guion, receiver, to the report of the referee be sustained, the report as to him be set aside, and that his claim be heard before a new referee to be appointed by the Supreme Court, and that the costs of this appellant in all the courts be paid out of the assigned estate."

Clark Bell for appellant.

W. M. Jenks, *Albert W. Seaman* and *William Allen Butler* for respondent.

All concur, ANDREWS, J., in result, and GRAY, J., not voting.

Ordered accordingly.

CHARLES B. LINTON, Respondent, *v.* THE UNEXCELLED FIREWORKS COMPANY, Appellant.

A written agreement, while it exists, must control as to all the terms expressed in it, although those terms differ from the prior oral agreement. If the difference was caused by mutual mistake, it is necessary to reform the contract so as to express the true agreement.

(Submitted October 8, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1891, which reversed a judgment so far as it was in favor of defendant, entered upon a decision of the court on trial at Special Term and ordered judgment for

plaintiff, and which affirmed so much of said judgment as dismissed a counter-claim of defendant.

This action was brought to reform a contract between the parties to require the defendant to issue to the plaintiff four and one-half shares of its capital stock, pursuant to an alleged agreement actually made.

The complaint alleges in brief that on July 14, 1884, the defendant hired the plaintiff to be superintendent of its fireworks factory under an oral agreement which was as follows: (1) That the plaintiff should be paid for his services the fixed sum of $2,000 per year in cash, and also (2) That he should be allowed each year an additional sum equal to the proportion of the net earnings of the company which should be based on $3,000 worth of its stock (30 shares), and that when such earnings should equal the said par value of the said thirty shares of stock ($3,000), such shares should be issued to him, the said total sum thus accumulated to his credit and held by the company for him to be taken in payment therefor.

Further facts are stated in the opinion, which is given in full.

"The trial court found the original agreement between the parties was based upon the earnings of the thirty shares of stock, instead of upon the dividends. It found the written contract was executed in January, 1886, and while the oral contract was in existence. That written contract used the word 'dividends,' instead of 'earnings.'

"The plaintiff asked to have the written paper reformed so as to express the real agreement, and he alleged that the word 'dividends' was used in the writing by mutual mistake. There was substantially no contradiction in the evidence as to the fact that the parties meant the written contract to embody the terms of the oral. The person who dictated the agreement to the stenographer employed by defendants, was not himself present when the oral agreement between the plaintiff and the then president of the defendant was made, and so he asked the plaintiff what the terms were under which he was employed by defendant. While not positive as to the reply of the plaintiff whether he used the word 'earnings' or 'dividends' as the importance of the distinction had not then appeared; he says he is of the impression that plaintiff used the word 'dividends.'

At any rate that word appears in the written contract signed by both parties.

"The learned judge dismissed the plaintiff's complaint, because he said there was no proof of a mutual mistake in the use of the word 'dividends' in the written contract. The court also overruled the defendant's counter-claim on the ground that the payment of the 22 shares of stock, although an over-payment under the written contract was yet a voluntary one, and so could not be recovered back. Both parties appealed and the General Term, on the plaintiff's appeal, reversed the judgment dismissing the complaint, and held the plaintiff entitled to recover the shares of stock claimed by him, and without reforming the written agreement, gave judgment absolute in plaintiff's favor, decreeing that defendant should issue the four and a half further shares claimed by the plaintiff. The judgment against the counter-claim of the defendant was on defendant's appeal affirmed, with costs.

"We think the General Term erred in this disposition of the question. There was an original oral agreement between the parties, and the court finds that it provided for the issuing of the stock based upon earnings instead of dividends.

"The written agreement was intended to embody the terms of the oral one. It is said that Mr. Johnson, who acted for the defendant and dictated the substance of the agreement to be written out, no doubt intended to embody the terms of the oral agreement, but only as he understood them, and that as he understood them to be dividends he has made no mistake on the part of defendant, and that hence there was no mutual error within the meaning of the law, and so the written agreement should not be reformed.

"Having found that the terms of the oral agreement included the earnings of the company as distinguished from the dividends, and the parties really intending to put in writing the terms of such oral agreement, if Mr. Johnson placed the word 'dividends' therein, supposing that such was one of the terms of the agreement, when in truth it was not, and if the plaintiff signed the same supposing that it actually embodied the terms of the oral contract, when in truth it did not, we think a case was made out for the reformation of the written

contract. The mistake of Mr. Johnson was in regard to what were in reality the terms of the oral contract, and when he intended to embody these terms in the written contract, although he placed therein just what he intended to if he, in fact, mistook those terms and if the plaintiff mistakenly supposed he had embodied in the writing the terms of the oral contract when he had not, a mistake was made which a court of equity has power to relieve against. We do not, however, think that relief could be had by reference only to the original oral contract and in spite of the terms of the subsequent written one, without reforming such written one so as to conform to the truth.

"A written contract is always set out as the exponent of the oral understanding of the parties. While it exists as a full and legal agreement it must control as to all the terms expressed in it, and when such terms differ from those of prior oral ones, the writing must control. It is necessary, therefore, to reform it so as to express the true agreement. In this case the learned judge refused to find that neither party understood the words used in the written agreement to mean differently than the words of the oral agreement. There is some confusion in the findings in the case caused, as I think, by the views of the learned judge as to the rights of the parties, assuming that Mr. Reynolds meant to use the word 'dividends' in the written agreement. In that event he thought plaintiff ought not to have the contract reformed. Differing somewhat with those views of the case and regarding the order and judgment of the General Term as in any event erroneous, we have thought it best for all parties that there should be a new trial and the whole case more fully presented to the court.

"We think the judgments of the General and Special Terms should be reversed and a new trial granted, with costs to abide event."

Leslie W. Russell for appellant.

W. J. Gaynor for respondent.

PECKHAM, J., reads for reversal.

All concur.

Judgment reversed.

WILLIAM WALLACE et al., Respondents, *v.* FREDERICK D. BLAKE et al., Appellants.

In an action to recover the purchase-price of certain goods, the answer was a general denial. The evidence upon the trial showed conclusively the sale, delivery and acceptance of the goods. Defendants sought to show that after delivery defendants complained of the quality of the goods, and it was thereupon agreed that they should be considered as having received them as consignees to sell for and on account of plaintiffs; this was excluded. *Held*, no error; that it was an affirmative defense which might not be proved under a general denial.

Reported below, 24 J. & S. 519.

(Argued October 9, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made at the March term, 1890, which affirmed a judgment in favor of plaintiffs entered upon a verdict directed by the court, and affirmed an order denying a motion for a new trial.

The following is the opinion in full:

"The complaint alleged that in the month of March, 1886, the plaintiffs sold and delivered to the defendants several large quantities of worsted yarn at the prices stated, and judgment is demanded for the balance of the purchase-price unpaid. The only answer to these allegations are denials. The defendants also set up in their answer a counter-claim growing out of transactions with the plaintiffs prior to those mentioned in the complaint. Upon the trial no attempt was made by the defendants to prove their counter-claim, and under their answer the only defense left to them was the right to dispute the sale and delivery to them of the yarn. The sale and delivery were proved beyond question. The evidence was undisputed that they purchased the yarn, and that they received it and disposed of it. They attempted to show that after the sale and delivery of the yarn to them they complained to the plaintiffs of the quality thereof, and that then it was arranged that they should be considered as having received the yarn as consignees, and that they were to sell it for and on account of the plaintiffs. This defense the trial judge excluded on the ground that it was not pleaded. It was an affirmative defense which,

according to elementary rules of pleading, could not be shown under the denials in the answer.

"The defendants claim that they had the right to prove under their denials that they had not accepted the yarn. But the uncontradicted evidence shows that the yarn was purchased by them of the plaintiffs' manufacturers in England; that it was shipped to them as purchasers from England, and was taken, received and disposed of by them, and all this shows a legal acceptance of it by them. Their claim, however, is that after the yarn was delivered to them it was arranged that they should hold and sell it as consignees, and that thus they rejected it as purchasers. But they had no right to assert this claim under their answer.

"To the defendants' claim that after they had purchased the yarn, and it had come into their possession and control as the purchasers, they rejected it because of its inferior quality, the answer again is that no such defense is alleged, and that there is no allegation in the answer that this yarn was in any respect inferior or defective.

"The reply to this answer contains no allegations or admissions which can cure the defective answer or enlarge its scope.

"The judgment should be affirmed, with costs."

W. C. Beecher for appellants.

Carlisle Norwood, Jr., for respondents.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

MARTIN FAHY, Respondent, *v.* THE ROME, WATERTOWN AND OGDENSBURG RAILROAD COMPANY, Appellant.

(Argued October 9, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 3, 1891, which affirmed a judgment in favor

of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

William H. Gilman for appellant.

Henry Purcell for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

ALBERT T. BROWN, Appellant, *v.* SARAH TEEL et al., Impleaded, etc., Respondents.

(Argued October 9, 1891; decided October 27, 1891.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 4, 1891, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit and granted a new trial.

James C. Rogers for appellant.

George B. Lawrence for respondents.

Agree to affirm; no opinion.
All concur.
Order affirmed.

RICHARD TAYLOR, Appellant, *v.* CHRISTOPHER SMITH, Respondent.

(Submitted October 9, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made the second Monday of December, 1890, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

G. W. Cothran for appellant.

Box, Norton & Bushnell for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

FREDERICK W. BLOSSOM, Appellant, *v.* SPENCER P. SHOTTER, Respondent.

(Argued October 12, 1891; decided October 27, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 13, 1891, which reversed a judgment in favor of plaintiff entered upon a verdict directed by the court and ordered a new trial.

James M. Gifford for appellant.

James Byrne for respondent.

Agree to affirm on opinion below.
All concur.
Order affirmed.

HORATIO G. SEEBER, Appellant, *v.* THE AMERICAN MINING AND MILLING COMPANY, Respondent.

(Argued October 13, 1891; decided October 27, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1890, which overruled plaintiff's exceptions and directed judgment for defendant on order dismissing the complaint herein.

Thomas J. Ritch for appellant.

Andrew Dutcher for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

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GEORGE F. COMSTOCK, Appellant and Respondent, *v.* THE CITY OF SYRACUSE et al., Appellants and Respondents.

WILLIAM A. SWEET, Appellant and Respondent, *v.* THE CITY OF SYRACUSE et al., Respondents and Appellants.

(Submitted October 19, 1891; decided October 27, 1891.)

MOTIONS for reargument.

George F. Comstock and *Charles H. Peck* for motions.

Charles L. Stone and *Willam A. Beach* opposed.

Agree to grant motions; no opinion.
All concur.
Motions granted.

HARMON C. SHULTZ, Respondent, *v.* GEORGE W. MEAD, Appellant.

(Submitted October 12, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made at the February Term, 1890, which affirmed a judgment in favor of plaintiff entered upon an order of the County Court of Kings county.

George W. Mead appellant in person.

James & Thomas H. Troy for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

GEORGE MUNRO, Appellant, *v.* ORMOND G. SMITH et al., Respondents.

(Argued October 12, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

made February 12, 1891, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Roger Foster for appellant.

Archibald L. Sessions for respondents.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

PHILIP W. GERMANN, Respondent, *v.* THE SUBURBAN RAPID TRANSIT COMPANY, Appellant.

(Argued October 14, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made April 6, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

James R. Marvin for appellant.

Leopold Leo for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

MARY LYNCH, Respondent, *v.* THIRD AVENUE RAILROAD COMPANY, Appellant.

(Argued October 14, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 8, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

William N. Cohen for appellant.

Henry W. Bates for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

MORRIS A. BROKMAN, Respondent, *v.* LEWIS MYERS, Appellant.

(Argued October 14, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 11, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Otto Horwitz for appellant.

B. F. Einstein for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

BERNHARD METZ, Respondent, *v.* EDWARD LUCKEMEYER et al., Appellants.

(Argued October 15, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 7, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Charles Wehle for appellants.

Otto Horwitz for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

GUSTAV SCHNAIER et al., Respondents, *v.* KONRAD SCHMIDT et al., Appellants.

(Argued October 15, 1891; decided October 30, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 13, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

J. George Flammers for appellants.

Abram Kling for respondents.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

GUSTAV SCHNAIER et al., Respondents, *v.* KONRAD SCHMIDT et al., Appellants.

(Argued October 15, 1891; decided October 30, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 13, 1891, which affirmed an order of Special Term denying a motion to amend the judgment in the above-entitled action.

J. George Flammers for appellants.

Abram Kling for respondents.

Agree to affirm; no opinion.
All concur.
Order affirmed.

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ACTIONS.

See CAUSE OF ACTION.
CRIMINAL ACTIONS.

ADMISSIONS AND DECLARATIONS.

The declarations of a testator or intestate, binding him or binding and impairing his estate, may be given in evidence against his personal representatives, in all cases where they would have been competent against himself, if he had been living and a party to the action. *Hurlburt* v. *Hurlburt*. 420

ALBANY (CITY OF).

1. Under the provisions of the act providing "for the assessment and collection of taxes in the city of Albany" (§ 52, chap. 86, Laws of 1850), which, in case a purchaser at a tax sale shall be unable to recover possession of the real estate because of error or irregularity in the proceedings for the levying or collection, requires the board of supervisors of the county to reimburse the purchase-money, and upon the refusal or neglect to do so, authorizes the recovery of the money in an action against the board, when, in consequence of some defect in the proceeding, a sale is invalid, and because thereof the purchaser is unable to recover possession, he is at once entitled to reimbursement and his cause of action is barred, if suit is not brought in six years from the time when the right to make a demand for reimbursement was complete. (Code Civ. Pro. § 410.) *Reid* v. *Bd. Supvrs.* 364

2. In an action under said provision to recover back the purchase-money paid on various tax sales, all of which were made in and prior to 1883, and more than seven years before the commencement of the action, it was not alleged in the complaint or shown upon the trial that any legal proceeding had been instituted by the purchaser or his successor in interest to recover possession of the land, or that he made any effort to obtain possession, but it was admitted that by a decision of this court (*Remsen* v. *Wheeler*, 105 N. Y. 573), rendered four years after the sale in an action between other parties, sales under similar proceedings in another locality were adjudged illegal and void. The court below decided that neither the purchaser nor plaintiff, his successor in interest, was entitled to bring an action for reimbursement until such decision, and so that the action was not barred by the statute. *Held*, error; that the decision had no effect upon and in no way changed the rights, duties or obligations of the parties here, but was simply an authority as to the law *Id.*

3. *It seems* said provision requires that before a recovery can be had in such an action plaintiff must show an effort on the part of the purchaser to obtain possession under the tax sale, and that he was unable to do so because of its invalidity; it is not sufficient to show merely that the sale was illegal. *Id.*

4. *It seems*, however, the purchaser is not bound to bring an action or to institute a proceeding, such as is authorized by the act (§ 48); if he demand possession of the occupant or owner, and this is refused on the ground of invalidity of the sale, he then may make his demand for reimbursement; in which case, however, he assumes the burden of establishing the invalidity of the sale. *Id.*

5. *It seems*, also, that the purchaser must act within a reasonable time

after he obtains his certificate; that in case he institutes legal proceedings and conducts them to a determination with reasonable diligence, the statute will begin to run from such termination; and that if he relies upon a demand of possession, and this is shown to have been made within a reasonable time, the statute will begin to run from that time. *Id.*

6. *It seems*, also, that the question as to what is a reasonable time, is one of law. *Id.*

7. The amendment of said provision made by the act of 1889 (Chap. 429, Laws of 1889), which requires the reimbursement to be made "within six years from such sale," is prospective in its character, and so has no effect upon prior sales; said amendment did not repeal the limitations of the Code of Civil Procedure, but left them to apply to the past and simply made a new rule for future cases. *Id.*

8. *It seems*, also, that the legislature might have made the amendment retroactive in its character, provided a reasonable time was given to the purchaser to claim and enforce reimbursement after the amendment took effect. *Id.*

APPEAL.

1. In determining as to whether the amount in controversy in an action is less than the sum limited for an appeal to this court, the evidence as well as the pleadings may be resorted to. *Blake* v. *Krom*. 64

2. Where, in an action on two promissory notes, the making and execution thereof was admitted by the answer, which set up two counter-claims, and it appeared by the evidence that the amount to which defendant was entitled in any event upon one of the counter-claims, including the amount claimed upon the other, was less than $500, *held*, that the judgment was not reviewable here; also, that as defendant in the other counter-claim claimed a liability on contract fixed at a certain sum, and did not move to amend or increase the claim, he could not be heard upon appeal here to claim that his demand was larger than that stated. *Id.*

3. While *it seems*, a proceeding on the part of a client, or his assignee, to compel his attorney to pay over money received by him for the client, may be entertained, and the court may direct payment of the money or punish the attorney by fine or imprisonment, this is not a matter of absolute legal right, but simply one of discretion, and an order refusing to grant the relief sought, which does not show that it was made because of want of jurisdiction, is not reviewable here. *Schell* v. *Mayor, etc.* 67

4. Upon an appeal from an order of Special Term confirming an award of commissioners appointed to appraise lands taken by a railroad company, the General Term reversed the order of Special Term and ordered a new appraisal before the same commissioners. *Held*, that the order being one in a special proceeding and not final, was not appealable to this court. (Code Civ. Pro. § 190, subd. 3.) *In re S. B. R. R. Co.* 93

5. It appeared that the land taken was part of a highway known as the "southern boulevard," laid out under the act of 1867 (Chap. 290, Laws of 1867), which provides (§ 24) that no rails shall be laid in said boulevard except for the purpose of crossing it, and that if the legislature thereafter authorize the building of a railroad along it, nothing in said act shall be construed to affect or cut off the rights of the owners of the lands taken for the boulevard from claiming and receiving the full value of the lands taken for the road, to the same extent as if no boulevard had been laid out. The petitioner claimed that the provision as to damages was repealed by the amendment of said act in 1887 (Chap. 723, Laws of 1887). A merely nominal award was rendered to the land owners by the commissioners appointed to appraise damages; the General Term reversed the order confirming said award upon the ground that the

legislature could not take away the rights reserved to the property owners under the act of 1867, without compensation. *Held*, that the order appealed from did not come within the provision of the Code of Civil Procedure (§ 190, subd. 2), making, in certain contingencies, an order adjudging a statutory provision of the state unconstitutional, appealable to this court; that said provision relates only to orders in an action affecting a substantial right, and not resting in discretion. *Id.*

6. The provision of the Code of Civil Procedure (§ 1361), which declares that appeals from determinations in special proceedings are governed by the provisions of said Code, and the general rules of practice relating to "an appeal in an action, except as otherwise specially prescribed by law," applies to appeals to the General Term of the Supreme, or of a superior city court, not to appeals to this court. *Id.*

7. Where the General Term has power to hear and decide an appeal from an order, the order it makes is within its jurisdiction, even though an erroneous reason be given for its exercise. *Id.*

8. This court cannot review an exercise of the discretion of the General Term in granting or refusing a new trial in a criminal case. *People* v. *Most.* 108

9. The effect of a request by both parties upon trial of an action for a direction of a verdict in his favor is to clothe the court with the functions of the jury; if the party, whose request is denied, does not thereupon request to go to the jury on the facts, a verdict directed for the other party stands, as would the finding of a jury for the same party in the absence of any direction, and the review, upon appeal to this court, is governed by the same rules as apply in cases of verdicts rendered without direction; all controverted and inferable facts will be deemed conclusively established in favor of the party for whom the verdict was directed. *Thompson* v. *Simpson.* 270

10. Where the General Term directed a reduction of a judgment and an affirmance for the reduced amount, if plaintiff consented to the reduction, which he did, *held*, that of this defendants could not complain. *Carter* v. *Beckwith.* 312

11. Upon appeal from a judgment in favor of plaintiff in an action upon a contract, the General Term reversed the judgment, unless plaintiff consented to deduct therefrom a sum specified "without prejudice to a future action to recover the same or any part thereof," and in case of such consent, affirmed the judgment. Plaintiff consented and the judgment as modified was affirmed. Upon appeal by defendant, *held*, that plaintiff would not be heard to insist that the original judgment was correct, but it was to be assumed that it was erroneous, at least to the extent indicated; also that the court had no power to grant plaintiff the privilege to sue again to recover the amount deducted; and so that defendant was entitled to a reversal and new trial. *Lawrence* v. *Church.* 324

12. The parties entered into a verbal contract by which plaintiff agreed to occupy a portion of defendant's farm for a period of five years, each to do certain work and furnish certain things specified, the receipts of sales of the products of the land to be equally divided. Plaintiff took possession of the premises and occupied for over two years, when he was dispossessed. In an action to recover damages for breach of the agreement defendant claimed and the referee found that it was void, as it was not to be performed within a year. The referee, however, gave judgment in favor of plaintiff on the ground that a former adjudication was conclusive against defendant. Plaintiff's counsel claimed that as the Statute of Frauds was not pleaded and no point with respect to said agreement made upon the trial, the defendant could not raise that question on appeal. *Held*, untenable; that an exception to the finding of the referee that plaintiff was entitled to recover damages upon an agreement held

by him to be void, was sufficient to raise the question. *Unglish* v. *Marvin*. 380

13. The mere intimation of an opinion by a judge upon the evidence or upon the merits of the case, or his comments upon the evidence, although unfavorable to one of the parties, while it may be ground for setting aside the verdict on motion, furnishes no ground for a reversal in this court, where the case was submitted to the jury upon a charge which laid down no improper rule of law. *Hurlburt* v. *Hurlburt*. 420

14. Where the court below has refused to set aside the verdict and has affirmed the judgment entered thereon, in the absence of any errors of law properly excepted to, the case is not reviewable here. *Id.*

15. An appeal to this court does not lie for the purpose of settling abstract questions, however important, but is allowed only where the party appealing has an interest in the controversy which has been injuriously affected by the decision below. *Bryant* v. *Thompson*. 426

16. A party seeking to have a judgment reviewed in this court must be able to point to some statute giving him the right and conferring jurisdiction. *Id.*

17. The executors and trustees under the will of T. brought an action for its construction, asking the court to determine which of two parties was entitled to a certain fund in plaintiffs' hands as trustees. The judgment rendered decided the question, and this was acquiesced in by both of the alleged claimants to the fund, who were parties and were of age. *Held*, that as under the Code of Civil Procedure (§ 1294) the right to appeal is limited to "a party aggrieved," and as plaintiffs were not aggrieved by the judgment within the meaning of said Code, they were not entitled to appeal. *Id.*

18. Where, in an action by an abutting owner to restrain the operation and maintenance of an elevated railroad in a street, the question as to the fee value of the property rights of which plaintiff is deprived by the unlawful structure is gone into for the purpose of determining the amount to be paid by defendant for a conveyance of those rights, the defendant is entitled to claim that the investigation shall be made upon competent and legal evidence, and if improper evidence is admitted, to its damage, it has the right to ask the appellate court for relief; it is no answer that defendant is not bound to avail itself of the privilege granted of paying the amount of damages found for a conveyance of the easements, but may submit to an injunction. *Roberts* v. *N. Y. E. R. R. Co.* 455

19. In an action by an abutting owner to restrain defendant from the maintenance and operation of its elevated road in a street, the judgment of the trial court granted an injunction unless defendant paid a sum fixed as the damages to the fee, upon receiving a conveyance from plaintiff of the easements taken, in which case it was denied. It was claimed here that the whole judgment should not have been reversed because of error in admitting improper evidence bearing upon the question as to the damages to the fee, but that the portion which awarded the injunction should be permitted to stand. *Held*, untenable; that the question as to the granting of the injunction was dependent upon the amount of damages, as unless the court had found them to be substantial, it could, in the exercise of its discretion, have withheld the injunction and left plaintiff to his remedy at law; also that it was discretionary with the court either to reverse in whole or in part. *Gray* v. *Manhattan R. Co.* 499

20. It is generally in the discretion of the court, when it finds error in part of a judgment requiring a reversal of that part, to reverse the whole judgment, and such discretion will not, except under peculiar circumstances, be interfered with upon appeal to this court. *Id.*

21. The right of appeal in criminal cases is statutory only, and in the absence of a statute authorizing it in a given case, no appeal can be taken. *People* v. *Trezza*. 529

22. An order denying a motion for a new trial, made in a criminal case, after final affirmance of a judgment of conviction, upon the ground of newly-discovered evidence, is not reviewable here, either upon appeal or certiorari. *Id.*

23. Such an order is only reviewable in connection with, and upon appeal from the judgment, and when it is embodied in the judgment-roll. (Code Crim. Pro. §§ 485, 517.) *Id.*

24. An appeal under the provision of the Code of Criminal Procedure (§ 528, as amended by chap. 493, Laws of 1887), to this court from a conviction in a capital case, stays the judgment of death, but not that part providing for the custody of the defendant between his removal to the state prison and his execution. *Id.*

25. In proceedings by habeas corpus it appeared that the relator was convicted of the crime of murder and sentenced to death; that he appealed to this court where the judgment was affirmed; that after the appeal he was taken to state prison and there detained in close confinement. One ground upon which the prisoner's discharge was asked was that he had been once punished by imprisonment. *Held*, untenable; also that if the appeal operated to stay the continuance of the close confinement as well as the execution of the death penalty, then his subsequent imprisonment was unlawful, and the convict could not elect to submit to it and then treat it as a satisfaction of the sentence. *Id.*

26. Under the provision of the Code of Criminal Procedure (§ 542), which requires this court, on appeal to it in a criminal case, to "give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties," where incompetent evidence bearing upon a collateral issue has been received, but it appears that the evidence could have had no important effect upon the result, the error is not a sufficient ground for a reversal. *People* v. *Wayman*. 585

27. It is not error for a court to refuse to embody the language of an elementary writer in a charge to the jury; the trial judge may select the words in which he chooses to express his views of the law, and unless he lays down incorrect propositions, or refuses to instruct them as to pertinent, material and necessary points, there is no error calling for the interposition of an appellate court. *Id.*

28. A decision of the General Term of the Supreme Court, rendered upon report of commissioners appointed to appraise lands in proceedings to acquire title thereto under the Rapid Transit Act (Chap. 606, Laws of 1875) is not reviewable in this court. *In re Met. E. R. Co.* 600

29. An appellant will not be denied the right to withdraw his appeal and discontinue the litigation, because of the fact that the attorney who brought the appeal, but who has ceased to represent the appellant, objects thereto. *Holy Tr. Church* v. *Church St. Stephen*. 604

30. The Court of Appeals, on appeal to it, can consider only errors alleged to have been committed by the court below, and the case must be heard upon the same record which was used before the General Term. *People* v. *Dewey*. 606

31. A reversal of a judgment, therefore, cannot be based upon matter subsequently brought into the case by stipulation, and such a stipulation will be disregarded. *Id.*

32. A motion for judgment of affirmance or to dismiss an appeal, based on the ground that only the same questions arise therein which have been passed upon by this court in other cases lately decided, will not be granted where this is denied by the appellant. *Clark* v. *Claflin*. 610

33. In reviewing the evidence on appeal in a criminal case under the Code of Criminal Procedure (§§ 485. 517. 528, as amended by chap. 493, Laws of 1887), where the judgment is of death, this court is governed by the practice regulating appeals to the Supreme Court in dealing with questions of fact. *People* v. *Loppy*. 629

34. Unless, therefore, there are circumstances indicating some partiality, mistake, error or prejudice on their part, the findings of the jury on disputed and conflicting evidence must be taken as conclusive. *Id.*

35. Where an action had been repeatedly tried, and upon the last trial was retried on the same evidence given on the previous trials, which was read from the former records, and there appeared no probability that the case could be changed in any material aspect on another trial, *held*, that the General Term, on reversal of a judgment in plaintiff's favor, had power to dismiss the complaint. *Brackett* v. *Griswold*. 644

36. The supervisor of a town has power, notwithstanding the direction of a town meeting, to refuse or neglect to appeal from a judgment rendered against him as such officer, and an appeal if brought is still under his and his attorney's control, and they may withdraw the same. *Chase* v. *Defendorf*. 652

37. Where a supervisor, after service of notice of appeal, withdrew the same upon receipt of a stipulation extending time to appeal and subsequently entered into an agreement for a compromise and settlement of the action, and thereupon an order was entered upon stipulation dismissing the appeal, *held*, that while the court below might give relief against the stipulations and order, defendant was not entitled thereto, as matter of law, but it rested in the discretion of the court; and that the exercise of this discretion was not reviewable here. *Id.*

38. Plaintiff's complaint set forth a cause of action for malicious prosecution and alleged that plaintiff had executed a release thereof, which release was extorted by threats and under duress. The relief asked was that the release be canceled and damages awarded for the malicious prosecution. The case came up for trial at Circuit, and upon plaintiff's opening, the court upon its own motion directed the withdrawal of a juror and the transfer of the cause to the Special Term for trial. The case was tried there, neither party objecting, and no demand for a jury trial having been made by plaintiff to determine any of the issues. At the close of the evidence the complaint was dismissed. *Held*, that it was proper to send the case for trial to the Special Term, the equitable relief sought being an indispensable condition to the existence of the legal right of action; that plaintiff, having proceeded to trial without objection, or request for the intervention of a jury, could not complain here of the tribunal to whose jurisdiction he had submitted. *Stono* v. *Weiller*. 655

—— *As to form of undertakings on appeal.*

See McElroy v. *Mumford*. 303

—— *As to practice in Board of Claims on the sending down of remittitur modifying an award.*

See Sayre v. *State* (Mem.). 623

—— *Where party claims to have been misled by entry on clerk's minutes on trial, and in consequence failed to produce proof, his proper remedy is not by appeal, but by motion to have case opened and be let in to make further proofs.*

See Quinlan v. *Stratton* (Mem.). 659

ASSESSMENT AND TAXATION.

1. The provision of the act "in relation to the collection of taxes on lands of non-residents" (Chap. 427, Laws of 1855, as amended by chap. 448, Laws of 1885), declaring that after a certain time a deed of the comptroller, executed upon sale for the non-payment of taxes, shall be "conclusive evidence" that "the sale * * *

and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of two years allowed by law to redeem, were regular and regularly given, published and served" does not cure jurisdictional defects. *Joslyn* v. *Rockwell*. 334

2. As said act is one by its title relating "to the collection of taxes on lands of non-residents," and as in the purview of the tax laws, occupied lands are not lands of non-residents (1 R. S. 389, § 3) where lands of a non-resident are occupied by a resident the act does not apply thereto, and an assessment thereof to the owner in the "non-resident" part of the roll is illegal. *Id.*

3. As to whether a statute making a tax deed, after a certain designated time, conclusive evidence of the existence of every fact necessary to create a good title under the deed, would be a valid exercise of legislative power, as against the original owner who had always been in possession and whose possession remained undisturbed up to the time of the bringing of an action to obtain possession under the tax deed, and where said owner had in fact either paid his taxes before sale or a merely formal sale was made which was void for want of jurisdiction, *quære*. *Id.*

4 In an action of trespass, the plaintiff claimed title under deeds from the comptroller, executed on sales for unpaid taxes. The lands were assessed as non-resident lands; defendants were permitted to give evidence which tended to show that at the time of assessment they were occupied by a resident; also that said taxes were paid to the collector before he made his return to the county treasurer. These questions were submitted to the jury, who were charged that if the lands were occupied when assessed, the assessment was void, or if the taxes had been paid before being returned to the comptroller, all proceedings after payment were void. *Held*, no error. *Id.*

5. One S., a resident of Scotland, died there in 1881, leaving a will which appointed as sole executrix a resident of that country. All the residuary legatees were and still are residents of this state. Letters testamentary were issued to the executrix, and in 1882 ancillary letters of administration were issued by the surrogate of the county of New York to C., the petitioner herein, a resident of this state, who accepted and has continued to act thereunder. At the time of his death, S. owned personal property in this state, consisting mostly of debts due him from residents. In a proceeding to review an assessment, made in 1890, of said assets, which had remained in C.'s hands, against him as administrator, *held*, that the property was properly so assessed (1 R. S. 419, § 3); that C. was not entitled to exemption as an agent having moneys, in his possession or under his control, transmitted to him for investment or otherwise (1 R. S. 389, § 5); also that a sufficient period had elapsed since C.'s appointment to change the original character of the funds, assuming that they had been sent here and placed in his hands for investment; that it was his duty as administrator to distribute the assets as directed by the will, subject to the lawful orders of the surrogate and to the rights of resident creditors, and the resident distributees could not, by leaving them in his hands, escape taxation. *People ex rel.* v. *Coleman*. 524

See TAX SALES.

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. S. executed two chattel mortgages on certain property, which were properly filed, but were not refiled as prescribed by the statute. After the expiration of the time for refiling, default having been made in payment, one of the mortgagees took possession of the property. Thereafter S. executed a general assignment for the benefit of creditors. Upon judgments subsequently recovered against S. executions were issued, under

which the mortgaged property was advertised and sold. In an action by the purchaser to recover damages for the alleged conversion of the property, in which the validity of the assignment was in no way assailed, *held*, that whatever interest S. had, became vested in the assignee under the assignment; that plaintiffs acquired no title or interest by their purchase; and so, that the complaint was properly dismissed. *Tremaine* v. *Mortimer*. 1

2. In 1876, upon settlement of accounts between the firm of O. K. W. & Co., which was composed of three members, and the firm of V. A. W. & Co., composed of two members, who were also members of the former firm, a sum was found due the latter firm from the former. In settlement thereof it was agreed that O. K. W. & Co. should give its notes to each of the members of V. A. W. & Co. for one-half of the amount. At their request the note to which each was entitled was made payable to his wife. Each received his note and delivered it to his wife as a gift, and it was thereafter retained by her. O. K. W. & Co. paid interest on said notes each year up to 1884, by giving to the holders its notes therefor; in May of that year it became insolvent and made an assignment for the benefit of creditors, preferring the wives to the amount of the original notes and those given for interest. In an action by a judgment creditor of O. K. W. & Co., a portion of whose claim accrued in 1879, to set aside said assignment as fraudulent because of said preferences, *held*, that the action was not maintainable; that the payees named in the notes became absolute owners upon delivery to them, to the same extent as if they had paid value; and that such title and consequent right of recovery were in no way diminished or affected by the subsequent dealings or complications of the two firms. *F. N. Bank* v. *Wood*. 35

ATTACHMENT.

1. Where an attachment was obtained on the ground that the members of a firm had made an assignment with intent to defraud their creditors, and the only claim of fraud set forth in the moving papers was that the copartners gave their joint and several promissory notes for the individual debt of one of them, the other signing as surety, and that thereafter as a firm, and as individuals they executed the assignment, in which they directed that the notes should be paid out of the proceeds of the firm property, *held*, that no fraud was shown; and that the denial of a motion to vacate the attachment upon the papers on which it was granted was error. *Citizens' Bank* v. *Williams*. 77

2. Where, upon an application by a subsequent attaching creditor to set aside a former attachment, the facts set forth in the affidavit to prove that the subsequent attachment was a lien upon the same property were not within the personal knowledge of the affiant, but were based upon statements of another person, and no excuse was given for not procuring the affidavits of persons having personal knowledge of the facts, *held*, that the court while it could properly have taken the affidavit as sufficient, was not bound so to do, and so that a denial of the application was not error; and this although the affidavit upon which the first attachment was issued, was insufficient. *Hodgman* v. *Barker*. 601

ATTORNEYS.

1. The provision of the Code of Civil Procedure (§ 835) prohibiting an attorney from disclosing professional communications made to him by his client does not apply, as between the parties, to communications made by two or more persons in consultation with an attorney for their mutual benefit; it cannot be invoked in any litigation which may thereafter arise between such persons; although *it seems* it may in a litigation between them and a stranger. *Hurlburt* v. *Hurlburt*. 420

2. Where testimony of the attorney as to communications so made

would have been competent in an action between such persons, it is also competent in an action between their personal representatives as such; and this although the parties to the latter action are personally interested. *Id.*

3. As to whether, it being the duty of attorneys and counselors of the courts of this state to aid in the administration of justice, if they in a criminal case engage in vexatious proceedings, merely for the purpose of undermining the final judgment of the courts and defeating the law, do not expose themselves to the disciplinary power of the Supreme Court, *quære*. *People* v. *Jugigo*. 589

ATTORNEY AND CLIENT.

1. While *it seems*, a proceeding on the part of a client, or his assignee to compel his attorney to pay over money received by him for the client, may be entertained, and the court may direct payment of the money or punish the attorney by fine or imprisonment, this is not a matter of absolute legal right, but simply one of discretion, and an order refusing to grant the relief sought, which does not show that it was made because of want of jurisdiction, is not reviewable here. *Schell* v. *Mayor, etc.* 67

2. Plaintiff, an attorney, upon the request of B., defendants' intestate, who had been adjudged a lunatic and for whom a committee had been appointed, instituted a proceeding to supersede the commission, and to have restored to him possession and control of his property. The court, after a full hearing, ordered a reference to inquire as to the continued insanity of the petitioner; the proceedings resulted in a determination that the lunacy still continued. After the death of B., plaintiff presented to the administrators a claim for his services, and upon rejection thereof brought this action to recover the same. *Held*, that it appearing and having been found that plaintiff instituted the proceedings in good faith and that there was probable cause, the action was maintainable. *Carter* v. *Beckwith*. 312

3. During the life-time of B. plaintiff instituted proceedings by petition for an allowance. The matter was referred and the report of the referee in plaintiff's favor was confirmed by the Special Term, and an order made directing B.'s committee to pay plaintiff out of the lunatic's estate the sum awarded. An appeal was taken to the General Term, which was argued before the death of B., but was not decided until afterwards. The General Term reversed the order appealed from and vacated the reference, but did not deny the original application; the order of reversal was entered as of a date anterior to B.'s death. *Held*, that the question as to plaintiff's right to compensation was not rendered *res adjudicata* by the decision of the General Term, as that decision may have proceeded on grounds entirely consistent with plaintiff's claim to some compensation. *Id.*

4. The General Term directed a reduction of the judgment and an affirmance for the reduced amount, if plaintiff consented to the reduction, which he did. *Held*, that of this defendants could not complain. *Id.*

5. An appellant will not be denied the right to withdraw his appeal and discontinue the litigation, because of the fact that the attorney who brought the appeal, but who has ceased to represent the appellant, objects thereto. *Holy Tr. Church* v. *Church St. Stephen*. 604

BANKS AND BANKING.

1. A bank receiving commercial paper for collection is, in this state, in the absence of a special agreement, liable for a loss occasioned by the default of its correspondents or other agents selected by it to make the collection. *St. Nicholas Bank* v. *State N. Bank*. 26

2. Where the sub-agent makes the collection, but fails to pay over the proceeds and is insolvent, the insolvency does not shield the

collecting agent from liability for the loss. *Id.*

3. Plaintiff, a banking corporation organized and doing business in the city of New York, in the usual course of business, sent to defendant, a similar corporation doing business in the city of Memphis, a check drawn upon a Texas bank for collection. Plaintiff had for two years been accustomed to send commercial paper to defendant for collection, including paper payable in Texas. Defendant received the check, indorsed it for collection and forwarded it to A. & L., its correspondents in Texas, who were bankers in good standing. A. & L. collected the check and remitted to defendant their sight draft for the amount drawn by them upon a firm in New York city. Defendant received the draft and forwarded it to a New York bank for collection. Said bank presented it to the payors; they had suspended payment and payment was refused. The draft was accordingly protested and returned to defendant; the latter mailed it to plaintiff, but plaintiff refused to accept it. In an action to recover the proceeds of the check, *held*, that plaintiff was entitled to recover. *Id.*

4. Defendant claimed the contract was a Tennessee contract, and that under the law of Tennessee it was not liable. For the purpose of showing the law of that state, it put in evidence a decision of the Supreme Court in that state not based upon a statute, but upon the principles of common law supposed to be applicable to the facts in that case. *Held*, that the decision was not binding upon the courts of this state. *Id.*

5. It did not appear how or in what manner the contract between the parties was made. *Held*, the claim that the contract was a Tennessee contract was not sustained; that, in the absence of proof, it could not be assumed the contract was made in Tennessee, nor could it be regarded as a Tennessee contract for the reason that it was to be performed there; as so far as the check was concerned, the performance was to be in Texas and New York. *Id.*

BAWDY HOUSES.

In an action to restrain defendant, who was plaintiffs' adjoining neighbor in a city, from keeping a house of ill-fame and using his premises as an assignation house and to recover damages, the court found that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that persons occupying rooms in it acted in a boisterous and noisy manner and indecently exposed their persons at the window, "whereby the use and occupation of the plaintiffs' premises had been interfered with and rendered uncomfortable" and the occupants of their house "annoyed and seriously disturbed." The court granted the relief prayed for. *Held*, no error. *Cranford* v. *Tyrrell*. 341

BILLS, NOTES AND CHECKS.

1. While, as between the holder and drawer of a check, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer, unless loss has resulted to him, a different rule obtains as between holder and indorser. *Carroll* v. *Sweet*. 19

2. The holder, on accepting the check, assumes the obligation to present the same for payment within the time prescribed by the law merchant, *i. e.*, not later than the next day after its date, and if payment is refused, to protest the same and give notice of non-payment. A failure to do this discharges the indorser from liability as such, irrespective of any question of loss or injury. *Id.*

3. In an action to recover the balance of an indebtedness for services rendered, in which the defense was payment, it appeared that one W. gave his check to defendant for the amount of a loan. Defendant, on the same day, indorsed and delivered it to plaintiff at the place where the bank on which it was

drawn was located, to apply upon the indebtedness in suit. W. requested plaintiff to hold the check for a few days, stating if plaintiff would let him know when he wished to use the check, he would then provide for it. W. testified on the trial that he had then enough money to pay the check and would have paid it had payment been insisted upon. Plaintiff kept the check for nine days before he presented it for payment. W. in the meantime had become insolvent. The cashier of the bank on which it was drawn testified that there were no funds to meet it, and it would not have been paid if it had been presented any time after the day of its date. There was no agreement that the check in suit should be taken in absolute satisfaction of the debt. The court directed a verdict for the plaintiff. *Held*, error; that the delay in presenting the check discharged defendant from liability as indorser; that the delay was not excused by the fact that the drawer had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment: that while the indorsement and transfer of the check operated as a provisional payment only, if the delay caused a loss to defendant, to the extent of the loss the delay was tantamount to actual payment; that as there was evidence tending to show that the delay prevented a collection of the check in whole or in part, and that so much was lost to defendant, the case should have been submitted to the jury. *Id.*

4. Plaintiff, a banking corporation organized and doing business in the city of New York, in the usual course of business, sent to defendant, a similar corporation doing business in the city of Memphis, a check drawn upon a Texas bank for collection. Plaintiff had for two years been accustomed to send commercial paper to defendant for collection, including paper payable in Texas. Defendant received the check, indorsed it for collection and forwarded it to A. & L., its correspondents in Texas, who were bankers in good standing. A. & L. collected the check and remitted to defendant their sight draft for the amount drawn by them upon a firm in New York city. Defendant received the draft and forwarded it to a New York bank for collection. Said bank presented it to the payors; they had suspended payment and payment was refused. The draft was accordingly protested and returned to defendant; the latter mailed it to plaintiff, but plaintiff refused to accept it. In an action to recover the proceeds of the check, *held*, that plaintiff was entitled to recover. *St. Nicholas Bank* v. *State N. Bank.* 26

5. Where two firms, with one or more common members, have mutual dealings, one of the firms may give its notes for an amount found due from it on settlement of the account to the other or to individual members thereof; and *it seems*, actions at law may be maintained upon said notes without an accounting as between the members of the firm giving the notes. *First N. Bank* v. *Wood.* 35

6. While individuals who receive gifts of negotiable securities take them subject to all equities existing at the time between the original parties, they are not subject to such as may arise thereafter. *Id.*

7. In an action upon a promissory note dated at Washington, D. C., made payable at a bank in the state of New York, which bore interest at a rate legal in the place of its date, but illegal in this state, it appeared that the note was given to take up another note dated at Washington and payable there, which bore the same rate of interest and was similarly indorsed. The arrangement for renewal was made in Washington where the note in suit was drawn; it was handed to the maker to execute, he took it to his home in New York where he signed it and the defendant N. indorsed it. The note was then mailed to plaintiff at Washington. The indorser set up usury as a defense. *Held*, untenable; that as the contract of the parties, evidenced by the note, was made in, it was governed by the laws of the District of

Columbia; that the affixing of their signatures by the maker and indorser were simply details in the performance and execution of the contract which was consummated when the note was received by plaintiff; that the naming of a New York bank as a place of payment did not characterize it as a New York contract; and that while the engagement of the indorser was, in a sense, independent of that of the maker, this did not affect the local character of the contract. *Staples* v. *Nott*. 403

BOARD OF CLAIMS.

1. The legislature has no authority to confer jurisdiction upon the Board of Claims to pass upon a claim of an individual against the state for injuries arising from the canals, which claim, had it arisen between citizens, would be barred by the Statute of Limitations. (State Const. § 14, art. 7.) *Gates* v. *State*. 221

2. Accordingly *held*, that the act of 1886 (Chap. 244, Laws of 1886), authorizing and directing the Board of Claims to hear a certain claim against the state for injuries received by the falling of a canal bridge, was invalid, in so far as it authorized the board to make an award; it appearing that the accident happened in 1877. *Id.*

—— *As to practice in Board of Claims on the sending down of a remittitur modifying an award.* *See Sayre* v. *State* (Mem.). 622

BOND.

1. Under the provision of the Code of Civil Procedure (§ 2699), declaring that "before ancillary letters of administration are issued, the person to whom they are awarded must qualify in the manner prescribed for the qualification of an administrator upon the estate of an intestate, except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of this state," the power of the surrogate is not limited to requiring a bond not exceeding twice the amount appearing to be due to residents. *In re Prout*. 70

2. Said provision was intended to give the surrogate a discretion to modify the general rule (§ 2667), which requires a bond in a penalty not less than twice the value of the personal property and to accept one less in amount if, by reason of adequate security having been already given, additional security for the protection of the general interests is not in his judgment required, or where the next of kin have consented to waive security, and in the case of domestic creditors, where their protection was the only interest involved, to prescribe a limit beyond which security should not be exacted. *Id.*

See UNDERTAKING.

BOUNDARIES.

1. Where a highway is the dividing line between the lands of two adjoining proprietors, each owning to the center, and one of them conveys, bounding the lands along or upon the highway, in the absence of an express reservation in the deed, of his property in the highway, the deed conveys the fee to the center, subject to the public easement. *Haberman* v. *Baker*. 253

2. Where the grantor owns the fee of the soil of the whole highway, in the absence of facts raising a presumption of a contrary intent, the presumption is that the grantor intended to and the conveyance will be deemed to convey the fee of the whole highway. *Id.*

3. In either case, where by the abandonment of public easement the highway ceases to exist, the land comprising it reverts to the primary condition of ownership and of use, and becomes a parcel of the adjoining property, and the grantee is entitled to the possession of that portion conveyed by his deed. *Id.*

4 Where, therefore, certain lands in the city of New York were conveyed, bounded on the westerly side by an old road, title to the center whereof was in the grantor, and on the north by a road leading eastwardly from the other, title to the whole of which was in the grantor, and where, in the subsequent laying out and opening of city streets, the public use of pieces or gores of land, parts of the old road included in said titles, was abandoned, *held*, that the right to such use reverted to the successor in title to said grantee; that he had a full title to and right to convey the land bounded by the new streets; and so, was entitled to a judgment requiring a specific performance of a covenant for the purchase thereof. *Id.*

5. *It seems*, the rule is different where the description in a deed bounds the land by the side of the highway, or where there is a city street the title to which is in the municipality. *Id.*

BUFFALO (CITY OF).

1. Prior to 1875 plaintiffs owned certain premises on W. street in the city of Buffalo, their title extending to the centre of the street, subject to the public easement. In that year said city acquired by condemnation the title to a large number of its streets, including W. street, a uniform and nominal award of damages being paid to each of the owners, including plaintiffs. The city charter confers upon its common council power to alter the grade of streets and to "permit the track of a railroad to be laid in, along or across any street or public ground." (Laws 1870, chap. 519, tit. 9, §§ 1, 2, 6; tit. 8, § 19.) In 1882 said common council granted to defendant, a steam railroad corporation, the right to construct and maintain two tracks along the centre of W. street. In pursuance thereof and in accordance with the map and profile approved by said council and under the direction of the city engineer, defendant built an embankment in W. street in front of plaintiffs' premises, supported laterally by perpendicular stone walls, which practically excluded all abutting owners from that part of the street thus occupied, and so interfered with the use of the street as to cause the rental value of plaintiffs' premises to depreciate. *Held*, that an action was maintainable to recover damages for such depreciation. *Reining* v. *N. Y., L. & W. R. Co.* 157

2. Also *held*, that the action of the common council in authorizing the construction of the embankment was not a change of grade within the meaning of the charter, and, therefore, the provision of the charter that "when the city shall alter the recorded grade of any street or alley, the owner of any house or lot fronting thereon may, within one year thereafter, claim damages by reason of such alteration" (Tit. 9, § 17), did not apply so as to confine the plaintiffs to a remedy against the city. *Id.*

3. Also *held*, that while the authority conferred by the General Railroad Act (Chap. 140, Laws of 1850, § 24) upon railroad corporations to cross highways in the construction of their lines, authorizes their construction on, over or below the highway grade, and so, to make such incidental changes of the grade as may be rendered necessary, without giving a right of action to abutting owners who sustain injury, the change here made did not come within that authority. *Id.*

CANALS.

1. *It seems*, that the state in submitting itself to the jurisdiction of a tribunal, with respect to claims against it for damages sustained by reason of any accident occurring on its canals, or connected with their care and management, subjected the determination of its liability to the government of those rules which usually obtain in similar cases. *Gates* v. *State.* 221

2. Under the provision of the act of 1870 (Chap. 321, Laws of 1870), conferring upon the board of canal appraisers jurisdiction to hear and determine claims against the state

for injuries alleged to have been sustained by reason of the canal, which requires the proceeding to be initiated by the filing of the claim in the office of the appraisers, there must have been a delivery by or on behalf of the party of his claim at the office itself to constitute and enable him to allege and establish the jurisdictional fact of a filing; proof of the directing and mailing of a statement of the claim to the canal appraisers is not sufficient. *Id.*

3. The jurisdiction of said board being limited and special, no presumption will be entertained in support of it, but the fact conferring it must affirmatively and conclusively appear. *Id.*

4. A citizen who seeks to avail himself of the privilege to sue the state must be held to strictness in procedure; this right being dependent upon compliance with the terms of the statute granting it jurisdiction of his claim, can be acquired only in the way prescribed. *Id.*

5. The legislature has no authority to confer jurisdiction upon the Court of Claims to pass upon a claim of an individual against the state for injuries arising from the canals, which claim had it arisen between citizens, would be barred by the Statute of Limitations. (State Const. § 14, art. 7.) *Id.*

6. In an action to restrain the state officials and contractors with them from doing work authorized by the act of 1888 (Chap. 325, Laws of 1888), entitled "An act to provide for the dredging and excavating the channel of Seneca river and the old Bear race * * * to facilitate the passage of canal boats," which action was based upon the ground that the declared purpose of the act was not the real one, but that it was in fact simply for the benefit of individuals, and so was void, as it appropriated public money for a local and private purpose and did not receive the assent of two-thirds of either house of the legislature (State Const. art. 1, § 9), the court, against the defendants' objection and exception, entered into an inquiry in regard to the purpose of the appropriation, and after receiving the testimony of witnesses, found as a fact that the improvement could not benefit the canal, but would benefit the property of individuals, and that the purpose of the appropriation was not public, but private. *Held*, error; that the purpose expressed in the act was public, and even if the expenditure might be improvident and the work useless to the public, of its propriety and utility the legislature was the judge; that it could not be said that the state authorities were not proceeding in good faith, the more particularly as the legislature in 1889 (Chaps. 461 and 493, Laws of 1889) reappropriated the money to the same improvement, increasing the amount. *Waterloo W. Mfg. Co.* v. *Shanahan*. 345

7. It appeared that prior to the passage of the act, the state had diverted the waters of said river into the Cayuga and Seneca canal, and so deprived riparian owners, on the south side of the river, of its use. *Held*, assuming that the court had power to make the inquiry and that the purpose of the act was as was claimed by plaintiff, to restore a portion of the water so diverted to its original channel and the use of said owners, the purpose of the expenditure was public, not private or local, within the meaning of the Constitution, and so, that the act was valid. *Id.*

8. The court below also held the act to be invalid, because the effect was to take the plaintiff's property for private purposes. This determination was based solely upon the fact that the improvement would divert from the canal and restore to the channel of the river water, the use of which plaintiff had enjoyed without question for more than twenty years, he having no property right therein save as acquired by such user. *Held*, error; that the use by the plaintiff of the water beyond wh it was entitled to, however long continued, and whether adverse or by permission, could not impair the rights of the state: and that, so long as the legal rights of the

plaintiff, as between it and the state, were respected, it could not complain. *Id.*

9. Also *held*, that if plaintiff could establish any right to the use of the water that would be diverted by the improvement, the consequence would be an injury which would form the basis for a claim for damages or compensation before the tribunal authorized by the state to hear such claims, but would furnish no ground for an injunction; that the execution of the work did not involve the taking of any of plaintiff's property for any purpose, public or private. *Id.*

10. Property required by the state for canal purposes may be taken in a summary way without the aid of judicial proceedings; the title or the right to the use may be acquired at any time, and need not be obtained in advance. *Id.*

CASES REVERSED, DISTINGUISHED, ETC.

Porter v. *Parmlee* (52 N Y. 185), distinguished. *Tremaine* v. *Mortimer*. 9

Hill v. *N. A. R. R. Co.* (109 N. Y. 239), distinguished. *Alexander* v. *Rochester City & B. R. R. Co.* 19

Indig v. *N. C. Bank* (80 N. Y. 100), distinguished. *St. Nicholas Bank* v. *S. N. Bank*. 31

F. N. Bank v. *Wood* (45 Hun, 411), reversed. *F. N. Bank* v. *Wood*. 35

Phipps v. *Sedgwick* (95 U. S. 3), distinguished. *F. N. Bank* v. *Wood*. 41

Fox v. *Hanbury* (2 Cowp. 445), distinguished. *F. N. Bank* v. *Wood*. 43

Menagh v. *Whitwell* (52 N. Y. 146), distinguished. *F. N. Bank* v. *Wood*. 43

Tarbell v. *West* (86 id. 280), distinguished. *F. N. Bank* v. *Wood*. 44

Van Brunt v. *Town of Flatbush* (59 Hun, 192), reversed. *Van Brunt* v. *Town of Flatbush* 50

Wilson v. *Robertson* (21 N. Y. 587), distinguished. *Citizens' Bank* v. *Williams*. 82

Fobes v. *R., W. & O. R. R. Co.* (121 N. Y. 505), distinguished. *Reining* v. *N. Y., L. & W. R. Co.* 166

Ottenot v. *N. Y., L. & W. R. Co.* (119 N. Y. 603), distinguished. *Reining* v. *N. Y., L. & W. R. Co.* 169

Montgomery v. *Forbes* (148 Mass. 249), distinguished. *Demarest* v. *Flack*. 218

Hill v. *Beach* (12 N. J. Eq. 31), distinguished. *Demarest* v. *Flack*. 218

Land Grant Co. v. *Bd. Co. Comrs.* (6 Kan. 245), distinguished. *Demarest* v. *Flack*. 220

Woodward v. *Paine* (15 Johns. 492), distinguished. *Austin* v. *Vrooman*. 236

Lange v. *Benedict* (73 N. Y. 12), distinguished. *Austin* v. *Vrooman*. 237

Jackson v. *Sackett* (7 Wend. 94), distinguished and limited. *Hulbert* v. *Clark*. 298

Borst v. *Corey* (15 N. Y. 505), distinguished and questioned. *Hulbert* v. *Clark*. 300

McElroy v. *Mumford* (59 Hun, 173), reversed. *McElroy* v. *Mumford*. 303

Morse v. *Hasbrouck* (10 Abb. [N. C.] 407), disapproved. *McElroy* v. *Mumford*. 311

Waterloo Mfg. Co. v. *Shanahan* (58 Hun, 50), reversed. *Waterloo W. Mfg. Co.* v. *Shanahan*. 346

Reid v. *Supervisors* (60 Hun, 215), reversed. *Reid* v. *Supervisors*. 364.

Remsen v. *Wheeler* (105 N. Y. 573), distinguished. *Reid* v. *Bd. Supervisors*. 370

People ex rel. v. *Jones* (110 N. Y. 509), distinguished. *Bryant* v. *Thompson.* 435

Lawrence v. *M. E. R. Co.* (126 N. Y. 483), distinguished. *Pappenheim* v. *M. E. R. Co.* 453

King v. *Mayor, etc.* (102 N. Y. 171), distinguished. *Pappenheim* v. *M. E. R. Co.* 454

Tallman v. *M. E. R. Co.* (121 N. Y. 119), distinguished. *Pappenheim* v. *M. E. R. Co.* 454

Clark v. *Baird* (9 N. Y. 183), distinguished. *Roberts* v. *N. Y. E. R. R. Co.* 469

R. & S. R. R. Co. v. *Budlong* (10 How. Pr. 289), disapproved. *Roberts* v. *N. Y. E. R. R. Co.* 470

Hine v. *N. Y. E. R. R. Co.* (36 Hun, 293), disapproved. *Roberts* v. *N. Y. E. R. R. Co.* 470

Kenkele v. *Man. R. R. Co.* (55 Hun, 398), distinguished. *Roberts* v. *N. Y. E. R. R. Co.* 471

People ex rel. v. *Comrs. of Taxes* (42 Hun, 560; 105 N. Y. 629), distinguished. *People ex rel.* v. *Coleman.* 528

Williams v. *Supvrs.* (78 N. Y. 561), distinguished. *People ex rel.* v. *Coleman.* 529

Strohm v. *N. Y., L. E. & W. R. R. Co.* (96 N. Y. 305), distinguished. *Wallace* v. *Vacuum Oil Co.* 581

Martin v. *Gilbert* (119 N. Y. 298), distinguished. *Dale* v. *Gilbert.* 626

CAUSE OF ACTION.

1. Trespasses upon real property effected by an unlawful structure or nuisance are continuous in their nature and give separate successive causes of action from time to time as the injuries are perpetrated barred only by the running of the statute against the successive trespasses. *Galway* v. *Met. E. R. Co.* 132

2. So also, the right of an abutting owner to maintain an action at law or equity because of an invasion of his rights in a public street by the erection thereon of a structure which impairs his easement therein continues so long as he continues to be the owner of the property, without regard to the lapse of time, provided the remedy is claimed within the statutory period of limitation applicable to the legal right and before adverse possession has barred his title. *Id.*

See FALSE IMPRISONMENT.
MALICIOUS PROSECUTION.
NEGLIGENCE.
SPECIFIC PERFORMANCE.
TRESPASS.

CHATTEL MORTGAGE.

1. The provisions of the act in reference to chattel mortgages (Chap. 279, Laws of 1833, as amended by chap. 418, Laws of 1879), declaring such a mortgage absolu'ely void as to creditors of the mortgagor unless filed and refiled as prescribed, confers no title to the mortgaged property upon the creditors and they take no interest by virtue of the act; its effect is simply that in the cases mentioned, as between the creditors and the mortgagor, the mortgage has no force and is to be treated as if it had never existed. *Tremaine* v. *Mortimer.* 1

2. The mortgagor as well as the creditors can make this claim, and before the creditors acquire liens upon the property by virtue of executions or other process, the mortgagor may sell or assign and convey an absolute title, or he may deliver the property to the mortgagee in payment of his debt. *Id.*

3. A creditor may not, therefore, seize the property under an execution in his favor and at the same time deny that the mortgagor has any title. *Id.*

4. After default in payment of a debt secured by a chattel mortgage and even after the mortgagee has taken possession, the mortgagor has a beneficial interest in

the mortgaged property which he can convey. *Id.*

5. S. executed two chattel mortgages on certain property, which were properly filed, but were not refiled as prescribed by the statute. After the expiration of the time for refiling, default having been made in payment, one of the mortgagees took possession of the property. Thereafter S. executed a general assignment for the benefit of creditors. Upon judgments subsequently recovered against S. executions were issued, under which the mortgaged property was advertised and sold. In an action by the purchaser to recover damages for the alleged conversion of the property in which the validity of the assignment was in no way assailed, *held*, that whatever interest S. had became vested in the assignee under the assignment; that plaintiffs acquired no title or interest by their purchase; and so, that the complaint was properly dismissed. *Id.*

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. Even as to property of which the corporation had wrongfully obtained possession before the appointment of a receiver, after it has passed into his possession the owner may not, without first obtaining leave of the court, replevy it in an action against the receiver. *In re Christian Jensen Co.* 550

2. In an action to recover the possession of personal property, defendant gave an undertaking for the return of the property, which contained a recital admitting that plaintiffs had taken the property described in his affidavit and requisition from defendant's possession. Upon the trial, defendant offered to prove that he did not have in his possession, when demand was made upon him, more than one-quarter of the property mentioned in plaintiffs' affidavit, which offer was rejected, upon the ground that the admission was conclusive. Thereafter defendant, with the consent of his sureties, moved at Special Term for leave to substitute a new undertaking without the admission, in place of the original. The motion was denied upon the ground that as the court had held the admission conclusive, the court had no power to grant it. *Held*, error; that it was conclusive, only until set aside, and as to whether or not this should be permitted, rested in the discretion of the Supreme Court. *Dale* v. *Gilbert.* 625

CODES.

See CODE OF CIVIL PROCEDURE.
CODE OF CRIMINAL PROCEDURE.
PENAL CODE.

CODE OF CIVIL PROCEDURE.

§ 190, Subds. 2, 3. *In re S. B. R. R. Co.* 93
§ 388. *Galway* v. *M. E. R. Co.* 132
§ 410. *Reid* v. *Bd. Supervisors.* 364
§§ 494, 495, 496. *Otis* v. *Shants.* 45
§§ 498, 499, 501. *Lipman* v. *J. A. I. Works.* 58
§ 544. *Lawrence* v. *Church.* 324
§ 738. *Lynk* v. *Weaver.* 171
§ 835. *Hurlburt* v. *Hurlburt.* 420
§ 1274. *Teel* v. *Yost.* 387
§ 1294. *Byrant* v. *Thompson.* 426
§§ 1326, 1327, 1332, 1334. *McElroy* v. *Mumford.* 303
§ 1361. *In re S. B. R. R. Co.* 93
§ 1440. *Gilman* v. *Tucker.* 190
§ 1798. *People* v. *U. & D. R. R. Co.* 241
§§ 1948, 1949, 1956. *People ex rel* v. *Adams.* 129
§§ 2032, 2034, 2039. *People ex rel.* v. *P. E. House of Mercy.* 180
§§ 2419, 2424. *In re Christian Jensen Co.* 550
§ 2472. *Garlock* v. *Vandevort.* 374
§§ 2667, 2699. *In re Prout.* 70
§ 3070. *McKuskie* v. *Hendrickson.* 555
§§ 2862, 3228, 3229. *Lynk* v. *Weaver.* 171
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CODE OF CRIMINAL PROCEDURE.

§§ 485, 517, 528. *People* v. *Trezza*. 529
§§ 485, 517, 528. *People* v. *Loppy*. 629
§ 542. *People* v. *Wayman*. 585

COMPOSITION.

1. Under a liquidation agreement between a corporation and its creditors, plaintiffs were appointed trustees. In an action upon certain promissory notes given for property purchased by defendant of the trustees after they had assumed the trust, the answer alleged that defendant, as creditor, was induced to become a party to the liquidation agreement by false representations, and asked to have the same set aside and canceled as to him. *Held*, that a demurrer to the answer was properly sustained; that the proper parties were not represented in the litigation to entitle defendant to judgment upon the issue sought to be made by his answer; and that it set up no defense, as fraud inducing the execution of the contract was no answer to defendant's obligation to pay for property purchased of the trustees. *Otis* v. *Shants*. 45

2. The answer also set up as counter-claims claims arising on certain transactions between the corporation, its officers and agents, and defendant prior to the liquidation agreement. *Held*, that as the alleged claims were not against plaintiffs and had no connection with the cause of action set forth in the complaint, they were not proper matters of counter-claim; and that a demurrer was properly sustained. *Id.*

COMPTROLLER'S DEED.

1. The provision of the act "in relation to the collection of taxes on lands of non-residents" (Chap. 427, Laws of 1855, as amended by chap. 448, Laws of 1885), declaring that after a certain time the deed of the comptroller, executed upon sale for the non-payment of taxes, shall be "conclusive evidence" that "the sale * * * and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of two years allowed by law to redeem, were regular and regularly given, published and served" does not cure jurisdictional defects. *Joslyn* v. *Rockwell*. 334

2. As said act is one by its title relating "to the collection of taxes on lands of non-residents," and as in the purview of the tax laws, occupied lands are not lands of non-residents (1 R. S. 389, § 3), where lands of a non-resident are occupied by a resident the act does not apply thereto, and an assessment thereof to the owner in the "non-resident" part of the roll is illegal. *Id.*

3. As to whether a statute making a tax deed, after a certain designated time, conclusive evidence of the existence of every fact necessary to create a good title under the deed, would be a valid exercise of legislative power, as against the original owner who had always been in possession and whose possession remained undisturbed up to the time of the bringing of an action to obtain possession under the tax deed, and where said owner had in fact either paid his taxes before sale or merely formal sale was made which was void for want of jurisdiction, *quære*. *Id.*

4. In an action of trespass, the plaintiff claimed title under deeds from the comptroller, executed on sales for unpaid taxes. The lands were assessed as non-resident lands; defendants were permitted to give evidence which tended to show that at the time of assessment they were occupied by a resident; also that said taxes were paid to the collector before he made his return to the county treasurer These questions were submitted to the jury, who were charged that if the lands were occupied when assessed, the assessment was void, or if the taxes had been paid before being returned to the comptroller, all procedings after payment were void. *Held*, no error. *Id.*

CONFESSION OF JUDGMENT.

1. Neither process, declaration nor personal appearance of the defendant in any form is requisite in order to authorize the rendition, by a competent court, of a valid personal judgment by confession; an appearance upon the entry of the judgment of an agent, appointed by the defendant and authorized to appear, constitutes an appearance by him and gives the court jurisdiction to render judgment to the effect authorized. *Teel* v. *Yost*. 387

2. It is not necessary that a power of attorney to confess judgment should be acknowledged or attested by a subscribing witness. *Id.*

3. The filing in court of a power of attorney authorizing the confession of judgment for a specific sum gives the court jurisdiction over the party executing it, and authority to enter judgment for the sum specified, without proof of the nature, existence or amount of the debt. *Id.*

4. The provision of the Code of Civil Procedure (§ 1274) in relation to judgments by confession, requiring the defendant to state the nature and circumstances of the indebtedness and to verify the same, has no relation to the jurisdiction of the court or the authority of the clerk to enter judgment; its only purpose is to protect creditors from a judgment fraudulently confessed by an insolvent debtor; and so, the omission of the verified statement does not render the judgment void, but only voidable at the instance of certain creditors; it may not be impeached by the defendant because of the omission. *Id.*

The history of legislation in this state, in relation to judgments by confession given. *Id.*

The decisions of the highest courts of a state, as to the force and effect to be given to judgments of the courts of that state, may not be disregarded by the courts of another state, except for the gravest reasons and those demanded by the clearest rules of public policy and justice. *Id.*

7. A judgment by confession entered in another state upon a promissory note containing an authority to any attorney of the state to confess judgment for the sum agreed to be paid, if valid as a judgment *in personam* under the laws of that state is equally valid here, and may be enforced by action in this state. *Id.*

8. The fact that such a judgment was entered before the maturity of the note, does not affect its validity here, in case it appears that the judgment was authorized by the laws of the state where it was rendered. *Id.*

9. The manner of entry of such a judgment is matter of form, to be regulated by the laws of the state where it was rendered. *Id.*

10. In an action upon a judgment by confession rendered by a court of general jurisdiction of Pennsylvania, it appeared that said judgment was entered by the prothonotary, the clerk of the court, upon an instrument known as a "judgment note," filed with the records of the court which, after a promise to pay a certain sum, authorized "any attorney of any court of record in Pennsylvania or elsewhere, to confess judgment therefor," and waived all stay of execution from and after the maturity of the note. Both parties to the note resided in Pennsylvania. It appeared that such notes were authorized by the laws of said state and that a prothonotary, as the clerk of the court, upon application of the owner of the note is required to enter judgment thereon against the person executing the same, without the agency of any attorney, and it was found that the judgment was duly rendered according to the law of Pennsylvania. *Held*, that the judgment was valid and conclusive against defendant here. *Id.*

CONFLICT OF LAWS.

1. A judgment by confession entered in another state upon a promissory

note containing an authority to any attorney of the state to confess judgment for the sum agreed to be paid, if valid as a judgment *in personam* under the laws of that state is equally valid here, and may be enforced by action in this state. *Teel* v. *Yost*. 387

2. The fact that such a judgment was entered before the maturity of the note, does not affect its validity here, in case it appears that the judgment was authorized by the laws of the state where it was rendered. *Id*.

3. The manner of entry of such a judgment is matter of form, to be regulated by the laws of the state where it was rendered. *Id*.

4. In an action upon a promissory note dated at Washington, D. C., made payable at a bank in the state of New York, which bore interest at a rate legal in the place of its date, but illegal in this state, it appeared that the note was given to take up another note dated at Washington and payable there, which bore the same rate of interest and was similarly indorsed. The arrangement for renewal was made in Washington where the note in suit was drawn; it was handed to the maker to execute; he took it to his home in New York where he signed it and the defendant N. indorsed it. The note was then mailed to plaintiff at Washington. The indorser set up usury as a defense. *Held*, untenable; that as the contract of the parties, evidenced by the note, was made in, it was governed by the laws of the District of Columbia; that the affixing of their signatures by the maker and indorser were simply details in the performance and execution of the contract which was consummated when the note was received by plaintiff; that the naming of a New York bank as the place of payment did not characterize it as a New York contract; and that while the engagement of the indorser was, in a sense, independent of that of the maker, this did not affect the local character of the contract. *Staples* v. *Nott*. 403

CONSIDERATION.

1. *It seems* that a consideration is not an essential to an executed contract. *P. R. R. Co.* v. *Forrest*. 83

2. An agreement to rescind a previous contract containing mutual stipulations imports that, until rescinded, it was recognized as subsisting and binding by both parties, and the mutual releases form a sufficient valid consideration for the new agreement. *Id*.

CONSTITUTIONAL LAW.

1. While under the provision of the Constitution (art. 3, § 16, Const.), declaring that "no private or local bill * * * shall embrace more than one subject, and that shall be expressed in its title," every provision of such a bill must be germane to and fairly connected with and tending to promote the subject expressed in the title; when the subject is sufficiently expressed all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, may properly be incorporated in the act. *Van Brunt* v. *Town of Flatbush*. 50

2. The subject expressed in the title of the act entitled, "An act in relation to local improvements in the town of Flatbush and the acquisition of the rights of a plank-road company in said town" (Chap. 161, Laws of 1889), properly embraces the building and improvement of highways and the construction of sewers, and the act is not made repugnant to said constitutional provision because it contains a provision authorizing the construction of a trunk sewer through the adjoining town of Flatlands, a necessary part of the sewage system provided for in the act. *Id*.

3. Owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil, are entitled to the benefit of the street in front of their premises for access and other purposes, and cannot be deprived thereof

without compensation. *Reining* v. *N. Y., L. & W. R. Co.* 157

4. The right of such owners is not so absolute in its character that they can resist or prevent any and all interference with the street, to their detriment; nor can they assert it to stay the municipality in the control, regulation or improvement of the streets in the public interests, although it may be made to appear that the privileges said owners had enjoyed and the benefits they had derived from the street would be curtailed or impaired, to their injury, by the changes proposed. *Id.*

5. As against abutting owners, having no title to the bed of a city street, it is competent for the legislature to authorize the construction of a horse or steam surface railroad therein, without making compensation to them for consequential damages, arising from a reasonable use of the street for purposes of such a railroad, not exclusive in its nature, and when the road is substantially on the same grade as the street itself and passage across and through the same is left free and unobstructed for the public use. *Id.*

6. Where, however, the street is practically and substantially closed against such owners for ordinary street uses, they are entitled to compensation. *Id.*

7. Where a charter of a city confers upon its common council power to permit the track of a railroad to be laid in, along or across any street or public ground, this must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded. *Id.*

8. The legislature has no power to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief; the denial of a remedy for the wrong inflicted deprives him of his property as effectually as if it had been taken from him by direct legislative enactment. *Gilman* v. *Tucker.* 190

9. A statute which assumes to destroy or nullify a party's muniments of title is as effective in depriving him of his property as one which bestows it directly upon another. *Id.*

10. So, also, authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional prohibition as when it attempts to do the same thing directly. *Id.*

11. A statute which provides for an involuntary transfer of property from one person to another without due process of law, whether with or without compensation, is unconstitutional, whatever may be the pretext upon which it is founded. *Id.*

12. After judgment has been rendered in an action, the fruits thereof are rights of property, and are beyond the reach of legislative power to affect. *Id.*

18. The provision of the Code of Civil Procedure (§ 1440) relating to the title to real property sold on execution, as amended in 1881 (Chap. 681, Laws of 1881), which provides that if the title of the sheriff's "grantee or his assignees is adjudged for any reason or cause whatever to be null and void in any action for that purpose brought by the judgment debtor or his assignees, such judgment shall have no force or effect unless within twenty days after the entry" or in case of pending appeal, within twenty days after final judgment "the plaintiff shall pay to such grantee or his assignees the * * * money * * * paid on the sale, with interest from the time of the sale, * * * including the costs and expenses of defendant in defending the action, * * * and in the event of the plaintiff's failure to pay such purchase-money and expenses within the time aforesaid, said title shall be valid in said grantee," is unconstitutional and void; it violates the constitutional prohibition against depriving the owner of his property without due process of law, and it assumes to nullify a

final and unimpeachable judgment. It is also objectionable by reason of the ambiguity of the provision relating to the time limited for making the payments required by it. *Id.*

14. The legislature has no authority to confer jurisdiction upon the Court of Claims to pass upon a claim of an individual against the state for injuries arising from the canals, which claim, had it arisen between citizens, would be barred by the Statute of Limitations. (State Const. § 14, art. 7.) *Gates* v. *State*. 221

15. *It seems* the legislature may repeal a statute of limitation, and that a debt upon which the right of action was barred by the statute at the time of the repeal may thereafter be enforced by action without invading the constitutional rights of the debtor. *Hulbert* v. *Clark*. 295

16. As to whether a statute making a tax deed, after a certain designated time, conclusive evidence of the existence of every fact necessary to create a good title under the deed, would be a valid exercise of legislative power, as against the original owner who had always been in possession and whose possession remained undisturbed up to the time of the bringing of an action to obtain possession under the tax deed, and where said owner had in fact either paid his taxes before sale or a merely formal sale was made which was void for want of jurisdiction, *quære*. *Joslyn* v. *Rockwell*. 334

17. The general improvement of those public highways of the state, its canals and its navigable rivers, is for the benefit of the public at large, although some locality or individual may be benefited more than others. *Waterloo W. M. Co.* v. *Shanahan*. 345

18. Although an expenditure authorized by the legislature for such an improvement may be improvident or the work prove useless to the public, it may not be assailed in the courts at the suit of a private individual. The legislature, as the depository of the sovereign power of the people, is the exclusive judge of the propriety of the expenditure or the utility of making it. *Id.*

19. *It seems* that generally the question as to whether the use to which private property is proposed to be devoted by legislative power is public or private, is a judicial one and the courts are not concluded by any declaration of the law-making power as to the nature of the use. *Id.*

20. *It seems* also that where the legislature appropriates public money for some improvement, the courts may inquire whether the improvement is for a purpose which is public or one merely private or local, and if the purpose is private or local, whether the bill received the requisite two-thirds vote. *Id.*

21. The question, however, as to the nature of the purpose, must be determined by the language and general scope of the act; the judicial inquiry must be confined to the face of the bill itself and to things that are the subject of judicial notice. *Id.*

22. Where, therefore, the purpose declared in an act appropriating public money is a public one, the courts have no power, upon a suggestion that the professed purpose was not the real one, to institute an inquiry upon the testimony of witnesses, and to determine the purpose as a matter of fact. *Id.*

23. The courts cannot inquire into the motives and purposes of the legislature in order to attribute to it a design contrary to that clearly expressed or fairly implied in its enactment. It must be assumed that the legislature acted in good faith and meant what the bill expressed, although it may be possible to show, outside of its language and terms, that in fact all or the larger part of the benefits following the expenditure will inure to a few individuals. *Id.*

24. In an action to restrain the state officials and contractors with them from doing work authorized by

the act of 1888 (Chap. 325, Laws of 1888), entitled "An act to provide for the dredging and excavating the channel of Seneca river and the old Bear race * * * to facilitate the passage of canal boats," which action was based upon the ground that the declared purpose of the act was not the real one, but that it was in fact simply for the benefit of individuals, and so was void, as it appropriated public money for a local and private purpose and did not receive the assent of two-thirds of either house of the legislature (State Const. art. 1, § 9), the court, against the defendants' objection and exception, entered into an inquiry in regard to the purpose of the appropriation, and after receiving the testimony of witnesses, found as a fact that the improvement could not benefit the canal, but would benefit the property of individuals, and that the purpose of the appropriation was not public, but private. *Held*, error; that the purpose expressed in the act was public, and even if the expenditure might be improvident and the work useless to the public, of its propriety and utility the legislature was the judge; that it could not be said that the state authorities were not proceeding in good faith, the more particularly as the legislature in 1889 (Chaps. 461 and 493, Laws of 1889) reappropriated the money to the same improvement, increasing the amount. *Id.*

. It appeared that prior to the passage of the act, the state had diverted the waters of said river into the Cayuga and Seneca canal and so deprived riparian owners, on the south side of the river, of its use. *Held*, assuming that the court had power to make the inquiry and that the purpose of the act was, as was claimed by plaintiff, to restore a portion of the water so diverted to its original channel and the use of said owners the purpose of the expenditure was public, not private or local, within the meaning of the Constitution, and so, that the act was valid. *Id.*

The court below also held the act to be invalid, because the effect was to take the plaintiff's property for private purposes. This determination was based solely upon the fact that the improvement would divert from the canal and restore to the channel of the river, water, the use of which plaintiff had enjoyed without question for more than twenty years, he having no property right therein save as acquired by such user. *Held*, error; that the use by the plaintiff of the water beyond what it was entitled to, however long continued, and whether adverse or by permission, could not impair the rights of the state; and that, so long as the legal rights of the plaintiff, as between it and the state, were respected, it could not complain. *Id.*

27. A contemplated possible limited use by a few, and not then as a right but by way of permission or favor, is not a public use, and so is not sufficient to authorize the taking of private property against the will of the owner. *In re S. R. Cable R. Co.* 408

28. Although it may be within the power of the legislature to deprive a corporation of a franchise granted to it by its charter, if some public necessity demands it the power will not be deemed to have been exerted, in the absence of some unequivocal expression of legislative intent. *Suburban R. T. Co.* v. *Mayor, etc.* 510

CONSTRUCTION.

1. Where language is used in a statute which has a natural and legitimate office to perform, a construction which will create a criminal offense when none is expressed, is not justified. *People* v. *Tanner.* 416

2. That construction of a statue should be avoided which will injuriously affect existing rights, and one given which will harmonize its objects with the preservation and enjoyment of all such rights. *Suburban R. T. Co.* v. *Mayor, etc.* 510

3. While the courts may interpret doubtful or obscure phrases and

imperfect language in a statute so as to give effect to the presumed intent of the legislature and to carry out what appears to be the general policy of the act, they may not import therein a new provision to cure a *casus omissus*, however just and desirable it may be to supply the omitted provision. *McKuskie* v. *Hendrickson*. 555

CONTRACTS.

1. Plaintiff, a banking corporation organized and doing business in the city of New York, in the usual course of business, sent to defendant, a similar corporation doing business in the city of Memphis, a check drawn upon a Texas bank for collection. Plaintiff had for two years been accustomed to send commercial paper to defendant for collection, including paper payable in Texas. Defendant received the check, indorsed it for collection and forwarded it to A. & L., its correspondents in Texas, who were bankers in good standing. A. & L. collected the check and remitted to defendant their sight draft for the amount drawn by them upon a firm in New York city. Defendant received the draft and forwarded it to a New York bank for collection. Said bank presented it to the payors; they had suspended payment and payment was refused. The draft was accordingly protested and returned to defendant; the latter mailed it to plaintiff, but plaintiff refused to accept it. In an action to recover the proceeds of the check, *held*, that plaintiff was entitled to recover. *St. Nicholas Bank* v. *State N. Bank*. 26

2. Defendant claimed the contract was a Tennessee contract, and that under the law of Tennessee it was not liable. For the purpose of showing the law of that state, it put in evidence a decision of the Supreme Court in that state, not based upon a statute, but upon the principles of common law supposed to be applicable to the facts in that case. *Held*, that the decision was not binding upon the courts of this state. *Id*.

3. It did not appear how or in what manner the contract between the parties was made. *Held*, the claim that the contract was a Tennessee contract was not sustained; that, in the absence of proof, it could not be assumed the contract was made in Tennessee, nor could it be regarded as a Tennessee contract for the reason that it was to be performed there; as, so far as the check was concerned, the performance was to be in Texas and New York. *Id*.

4. *It seems* that a consideration is an essential to an executed contract. *O. P. R. R. Co.* v. *Forrest*. 83

5. An agreement to rescind a previous contract containing mutual stipulations imports that, until rescinded, it was recognized as subsisting and binding by both parties, and the mutual releases form a sufficient valid consideration for the new agreement. *Id*.

6. A contract obtained by duress is not ordinarily void, but merely voidable, and may be subsequently ratified and confirmed, and the party claiming to have been constrained, by afterwards voluntarily acting upon it, thereby affirms its validity and loses the right to avoid it. *Id*.

7. One entitled to repudiate a contract on the ground of duress, should act promptly. *Id*.

8. In an action to recover possession of 100 bonds issued by plaintiff, it appeared that the bonds in suit, with others, were delivered to G., defendant's testator, under an agreement on his part to furnish plaintiff certain rails and other railroad material; that G., having failed to take any steps towards performing the contract, although urged so to do, plaintiff's president, without notifying G. that if he did not perform, the contract would be considered rescinded, purchased the rails, notified G. of this, claimed that the contract had been broken and demanded a surrender of the bonds. G. refused to surrender or to consent to the cancellation of the contract, unless

he was allowed to retain 100 of the bonds. Thereupon an agreement was made between them that the contract should be canceled and surrendered, G. to retain the bonds in question upon his surrendering the others, which he did. Interest on the bonds in suit was paid by plaintiff to G. and his executors for about six years, when this action was commenced. Plaintiff claimed that the agreement of cancellation was void, because without consideration; also that it was invalid, because obtained by duress. *Held*, that a verdict was properly directed for defendants; that said agreement was founded upon a sufficient consideration, and if obtained by duress was subsequently ratified and confirmed. *Id.*

9. One who has been judicially determined to be a lunatic and for whom a committee has been appointed is incapable of entering into a contract, and any contract he assumes to make is absolutely void. *Carter* v. *Beckwith*. 312

10. By the agreement, upon which this action was brought, C., defendant's testator, agreed to pay to L., one of the plaintiffs, "$3,000, in such manner as will be acceptable to her." The referee allowed interest thereon from the date of the agreement. *Held*, error; that interest would not begin to run until a demand was made or a suit brought. *Lawrence* v. *Church*. 324

11. The parties entered into a verbal contract by which plaintiff agreed to occupy a portion of defendant's farm for a period of five years, each to do certain work and furnish certain things specified, the receipts of sales of the products of the land to be equally divided. Plaintiff took possession of the premises and occupied for over two years, when he was dispossessed. In an action to recover damages for breach of the agreement, *held*, that it was void, as it was not to be performed within a year; that the occupancy under it did not create a tenancy from year to year, and the relation of landlord and tenant in any form was not created either by the agreement or in consequence of any occupancy under it; and so, that plaintiff was not entitled to recover. *Unglish* v. *Marvin*. 380

12. In an action to recover an over payment alleged to have been made to defendants upon a contract for the purchase of railroad ties, it appeared that plaintiff agreed to take at certain prices for different woods, all ties defendants could get during the season, "ties to be counted and paid for before put in the river." Defendants were not paid more than they were entitled to for ties actually delivered and accepted, reckoning them at the prices fixed by the contract. The referee found that the word "counted," as used in the contract, meant inspected. Plaintiff claimed that, as on inspection part of the ties delivered were classified by plaintiff's inspectors as seconds, and were in fact seconds, he was not bound to pay therefor the price for first-class ties. *Held*, untenable; that the finding that the word "counted" means "inspected," might authorize the rejection of all but first-class ties, but did not in the absence of a provision in the contract to that effect, justify the conclusion that both firsts and seconds might be accepted and only the actual value of the seconds paid for them. *Larrowe* v. *Lewis*. 593

13. A written agreement, while it exists, must control as to all the terms expressed in it, although those terms differ from the prior oral agreement. If the difference was caused by mutual mistake, it is necessary to reform the contract so as to express the true agreement. *Linton* v. *Unexcelled Fire Works Co.* 672

See BILLS, NOTES AND CHECKS.
COMPOSITION.
SPECIFIC PERFORMANCE.
WARRANTY.

CORPORATIONS.

1. No public policy forbids the transaction of business in this state by a corporation formed in another state by citizens of this state for

the purpose of transacting business here, or requires the exclusion from recognition by the courts of this state of such a corporation. *Demarest* v. *Flack*. 205

2 The absence of terms imposed by the legislature as a condition of such a corporation doing business in this state, furnishes no ground for refusing to recognize it. *Id.*

3. The power rests with the legislature exclusively to say whether any, and, if so, what, terms shall be imposed upon such a corporation as a condition of its doing business here, and in the absence of any statute upon the subject and unless it appears that the corporation is formed to do acts prohibited by the laws of the state to its own citizens or corporations, if it is legally incorporated and entitled to recognition in the courts of the state where it was organized, it is entitled to recognition and protection in the tribunals of this state. *Id.*

4. In an action to recover damages for injuries received by plaintiff while using a toboggan upon a slide on premises in the possession and management of defendants, the complaint alleged that defendants were a joint stock company doing business in New York city under a name given, and that the injuries arose from the negligence of their employes. The answer denied these allegations. Upon the trial, plaintiff gave no evidence as to defendants being a joint stock company, but endeavored to prove a joint or partnership liability based upon allegations that the premises were leased to them for the purpose of putting up the toboggan slides. Defendants claimed that they were simply individual members of and stockholders in an incorporated company, which hired the grounds and operated the slides. They offered in evidence a certificate of incorporation of such company under the laws of West Virginia and also the Code of said state. These were objected to on the ground that the existence or incorporation of such company should have been pleaded. The objections were overruled. *Held*, no error; that the defense was not one necessary to be pleaded, but was admissible under the general denial in the answer. *Id.*

5. By said Code, it appeared that such a corporation could be formed under the general laws of that state, and the certificate, which was in proper form and properly signed and sealed, showed that all the requirements of the law had been complied with. *Held*, that the existence of an organization, so far valid as to entitle it to recognition as a corporation in the courts of this state and to transact business here, was proved. *Id.*

6. It appeared that a resident of New York acted as president of the corporation under a so-called election, although it did not appear how or when he was elected; also that another resident of New York acted as treasurer; that the company was in possession of the grounds, admission to which was charged, and the moneys paid went through the treasurer's hands. *Held*, that there was sufficient evidence of user to show the company had accepted its charter. *Id.*

7. Under the Code of West Virginia, the certificate is evidence of the existence of the corporation; after the issuing of the certificate, the corporators named therein are required to appoint a time and place for a meeting of the stockholders to elect directors, make by-laws, etc.; directors of such a corporation are required to be residents of the state, unless by resolution passed by the corporation persons of another state are permitted to be directors. It did not appear that any such resolution was passed but it appeared that the corporators and directors were citizens of New York. *Held*, that the election of non-resident directors, without a by-law or resolution permitting it, would not *ipso facto* dissolve the corporation, or take away its corporate rights or franchises. *Id.*

8. Upon the trial of an action, brought by the attorney-general in the name of the people, under

the Code of Civil Procedure (§ 1798), to enforce the forfeiture of the charter of a corporation, it is incumbent upon the state to show that a cause of forfeiture has not only been incurred by the defendant, but that it continues to exist, that its existence involves some public interest, and that the court has authorized the bringing of the action. *People* v. *U. & D. R. R. Co.* 240

9. Such an action is always within the control of the state, as the sole party interested to prosecute or abandon at its will or pleasure, and it may, through its legislature, not only discontinue the action, but waive or abolish causes of forfeiture, declare rights of action and limit the operation of the statute by forbidding the prosecution of such an action in specified cases. *Id.*

10. Although it may be within the power of the legislature to deprive a corporation of a franchise granted to it by its charter, if some public necessity demands it, the power will not be deemed to have been exerted, in the absence of some unequivocal expression of legislative intent. *Suburban R. T. Co.* v. *Mayor, etc.* 510

11. Defendant is a corporation organized under the act of 1881 (Chap. 589, Laws of 1881), for the purpose of erecting an apartment-house. In the prospectus issued for the purpose of inviting subscriptions for the stock, it was stated that a subscription for seventy shares would entitle the subscriber to certain apartments without additional rent. By the by-laws adopted by the corporation, it was provided that "all questions * * * as to how and to whom and what rent the several apartments shall be leased, and as to the apportioning and distributing of the said apartments among the stockholders, shall be decided by the vote of the majority of the stock, and not otherwise." Notwithstanding this, the directors adopted the prospectus, and in pursuance thereof a certain apartment was assigned to C., a subscriber. At a stockholders' meeting thereafter held, at which plaintiff was present as the representative of a stockholder, the by-laws were read and changes were made in the plans greatly increasing the expenditures; plaintiff voted in favor of the change; he subsequently purchased C.'s stock and took possession of the apartment assigned to him, which he leased. At a stockholders' meeting held thereafter, but before the stock was transferred to plaintiff on the books of the corporation, it was unanimously resolved that, in view of the increased expenditure, the capital stock should be increased, and that the stockholders should be charged ten per cent on the par of their stock as rent. Upon the transfer of the stock to plaintiff, he received a certificate for his proportion of the new shares, as well as for those purchased; he refused, however, to pay the rent, and when his apartment was vacated by his tenant, the corporation took possession and excluded him therefrom. In an action to recover possession, *held*, that plaintiff took his stock subject to the control of the stockholders as provided in the by-laws; that he had no legal title to the apartment, but simply an equitable right to it upon the conditions imposed by the stockholders' meeting, and by rejecting those conditions he lost that right, and so, had no title upon which he could recover possession. *Compton* v. *The Chelsea.* 537

12. Upon an application for the voluntary dissolution of a corporation, under the provisions of the Code of Civil Procedure (§§ 2149 *et seq.*) the court acquires jurisdiction upon a petition properly presented; by its appointment of a receiver the property of the corporation comes into its possession, and it has power to preserve and protect it; for this purpose it may prohibit any interference therewith in any action thereafter instituted. *In re Christian Jensen Co.* 550

13. Even if the order granted upon the petition is in some respects irregular, imperfect and informal, it is not, because of this, a nullity. *Id.*

14. While a receiver so appointed may not interfere with the property until he has filed his bond, when this is done his title relates back to the date of his appointment. *Id.*

15. Even as to property of which the corporation had wrongfully obtained possession before the appointment of a receiver, after it has passed into his possession, the owner may not, without first obtaining leave of the court, replevy it in an action against the receiver. *Id.*

16. An application under said provision prayed for a dissolution of the corporation; the order granted thereon was entitled "In the Matter of the Application of the Directors" of the corporation for a voluntary dissolution. The order recited that the corporation was insolvent, and required all persons interested to show cause why the prayer of the petitioner should not be granted. *Held*, that this was substantially a requirement to show cause "why the corporation should not be dissolved," and so was sufficient in this particular. *Id.*

17. The order did not direct its publication and did not specify the newspapers in which it was to be published, as required. (Code Civ. Pro. § 2424.) *Held*, that while this was a defect, it was not one which rendered the appointment of the receiver a nullity; also, that the court having jurisdiction of the proceedings had authority to make an order *nunc pro tunc*, correcting the defect. *Id.*

See FOREIGN CORPORATIONS.
MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.
RELIGIOUS CORPORATIONS

COSTS.

1. In an action brought by the attorney-general, under the Code of Civil Procedure (§§ 1948, 1949), to try the title to certain elective offices in a religious corporation, the complaint demanded costs against the defendants, of whom there were ten, and that each of them be required to pay to the state a fine of $2,000, as authorized by the Code (§ 1956). It did not appear that the offices in litigation were of any value in themselves, or that there were any emoluments or pecuniary advantages attached to them. The complaint was dismissed and an extra allowance of $350 was made, based upon the ground that the complaint contained a claim of $20,000. *Held*, error; that the demand in the complaint that the defendants be fined was not a claim that could form the basis of an extra allowance; that the fine was not a part of the cause of action or claim, but a mere incident to success in the action, resting wholly in the discretion of the court, which, if plaintiff had succeeded, could have been imposed whether alleged in the complaint or not; and that by demanding it, plaintiffs did not engraft upon the complaint any element of a pecuniary claim within the meaning of that term as used in the provision of said Code (§ 3253), authorizing an extra allowance. *People ex rel.* v. *Adams.* 129

2. No power is given under said provision to grant an extra allowance, except upon the basis of the value of the claim or subject-matter involved in the action and litigated directly, not incidentally. *Id.*

3. In the provision of the Code of Civil Procedure (§ 738), authorizing an offer of judgment by a defendant and providing that if plaintiff does not serve notice of acceptance and "fails to obtain a more favorable judgment, he cannot recover costs from the *time of the offer*, but must pay costs from that time," the words "time of the offer" mean "date of the offer;" it speaks as of the date when it was made. *Lynk* v. *Weaver.* 171

4. Defendant offered judgment for a certain amount, "with costs to date;" the offer was not accepted. Plaintiff recovered judgment for less than the amount offered, but was allowed costs on the ground

that the offer was a nullity and did not protect defendant against costs subsequent to the offer, because of the addition of the words "to date," as plaintiff, in case of acceptance, would have been obliged to incur the fees for entry of judgment. *Held*, error; that the costs of judgment were a portion of the costs "to date," and that those words were mere surplusage. *Id.*

5. Under the provision of the Code of Civil Procedure (§ 3228), specifying the cases in which a plaintiff is entitled to costs, all actions for trespasses on lands, so far as costs are concerned, stand on the same footing, and in an action for the recovery of treble damages, as well as in other actions of trespass where the title to the premises is not put in issue, if plaintiff recovers less than fifty dollars damages, not he, but the defendant is entitled to costs. (§ 3229.) *Id.*

6. The clause in said provision giving to plaintiff costs on recovery of judgment, irrespective of amount. "where a claim of real property arises on the pleadings," refers to a case where plaintiff's title is disputed by the answer. *Id.*

7. No claim of title arises in an action of trespass on lands upon a mere assertion of title in the complaint, which is not denied by the answer, and in such case plaintiff, upon a recovery of less than fifty dollars, is not entitled to costs. *Id.*

8. In an action brought by the attorney-general in the name of the people, under the provisions of the Code of Civil Procedure (§ 1798), to enforce the forfeiture of the charter of a corporation an extra allowance was granted. It was conceded that the only matters involved in the action was the existence of the defendant's corporate franchise, and that the extra allowance must be predicated upon the value of the franchise. The evidence showed that the corporation paid no dividends and no interest on its debt, and that its gross earnings for the previous year were insufficient to pay its operating expenses. The state, however, had imposed a tax upon "the corporate franchise and business" of the company under the act of 1881 (Chap. 361, Laws of 1881). *Held*, that the allowance was erroneous; that the tax imposed furnished no evidence of the actual value of the franchise. *People* v. *U. & D. R. R. Co.* 240

9. As costs are regulated by statute, a party is not entitled to them unless he can point to some statute giving them in such a case. *McKuskie* v. *Hendrickson.* 555

10. Plaintiff recovered judgment against defendant in a Justice's Court for thirty dollars and costs. Defendant appealed to the County Court, demanding a new trial, and served an offer allowing judgment against him for five dollars. Plaintiff did not accept, and made no offer himself. On trial in the County Court a verdict was rendered for plaintiff for thirty-five dollars. *Held*, that under the provisions of the Code of Civil Procedure regulating costs upon such appeals (§ 3070, as amended by chap. 522, Laws of 1885), plaintiff was not entitled to costs. *Id.*

11. *It seems* the only way a plaintiff can secure costs in such a case is by making an offer to take judgment for a sum specified, and if defendant refuses to accept he is liable to costs, unless the recovery is more favorable to him than the offer. *Id.*

12. Upon the granting of a peremptory writ of mandamus, with costs, an application for a stay pending appeal having been denied, defendant complied with the writ, paid the costs and appealed to the General Term, where the appeal was dismissed, the court holding that it was not a practical question, the terms of the writ having been complied with. *Held*, error; that the case should have been heard on the merits, as defendant would be entitled to a restoration of the costs paid, in case the order were reversed. *In re Martin* v. *W. J. J. Co.* 605

— *Where in action brought by executor for construction of will, it was found that the action was not brought in good faith, held, that plaintiff was properly charged individually with costs.*
See Garlock v. *Vandevort.* 374

COUNTER-CLAIM.

See PLEADING.

COUNTY COURT.

— *Where a defendant appeals to County Court from judgment of Justice's Court and demands a new trial, it seems the only way the plaintiff can secure costs, in case of a recovery of less than fifty dollars, is by making an offer of judgment; if defendant refuses to accept, he is liable for costs, unless the recovery is more favorable than the offer.*
See McKuskie v. *Hendrickson.* 555

COURT OF APPEALS.

1. The Court of Appeals, on appeal to it, can consider only errors alleged to have been committed by the court below, and the case must be heard upon the same record which was used before the General Term. *People* v. *Dewey.* 606

2. A reversal of a judgment, therefore, cannot be based upon matter subsequently brought into the case by stipulation, and such a stipulation will be disregarded. *Id.*

See APPEALS.

COURTS.

See COUNTY COURT.
COURT OF APPEALS.
GENERAL TERM.
JUSTICES OF THE PEACE.
SURROGATE'S COURT.

CRIMES.

1. It is competent for the legislative power to create new offenses, and it may also extend common-law definitions of particular offenses, so as to include acts not punishable under and not embraced within the common-law definition. *People* v. *Most.* 108

2. Identity, therefore, in the name of offenses at common law and under a statute does not necessarily imply that the same precise constituents and no others enter into both. *Id.*

CRIMINAL ACTION.

1. The right of appeal in criminal cases is statutory only, and in the absence of a statute authorizing it in a given case, no appeal can be taken. *People* v. *Trezza.* 529

2. An order denying a motion for a new trial, made in a criminal case, after final affirmance of a judgment of conviction, upon the ground of newly-discovered evidence, is not reviewable here, either upon appeal or certiorari. *Id.*

3. Under the provision of the Code of Criminal Procedure (§ 542), which requires this court, on appeal to it in a criminal case, to "give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties," where incompetent evidence bearing upon a collateral issue has been received, but it appears that the evidence could have had no important effect upon the result, the error is not a sufficient ground for a reversal. *People* v. *Wayman.* 585

4. When, in a criminal case, all the forms of law have been observed and the defendant has had every opportunity to make his defense, and his conviction has been affirmed by the highest court of the state, the contest in the courts should end. *People* v. *Jugigo.* 589

5. In reviewing the evidence on appeal in a criminal case under the Code of Criminal Procedure (§§ 485, 517, 528, as amended by chap. 493, Laws of 1887), where the judgment is of death, this court is governed by the practice regulating appeals to the Supreme Court in dealing with questions of fact. *People* v. *Loppy.* 629

6. Unless, therefore, there are circumstances indicating some partiality, mistake, error or prejudice on their part, the findings of the jury on disputed and conflicting evidence must be taken as conclusive. *Id.*

CRIMINAL TRIAL.

1. *It seems* that to uphold an indictment for an unlawful assembly under the Penal Code (§ 451, subd. 8), it must be proved that three or more persons being assembled, united in attempting or threatening an act "tending towards a breach of the peace or an injury to person or property, or any unlawful act." A threat made by one or two persons only, although in an assembly of many persons, would not be indictable. *People* v. *Most*. 108

2. It need not affirmatively appear, however, that other persons present when the threat was made uttered or repeated the same words; participation in the threat may be shown by the adoption by others of the language used, exhibited by their conduct. *Id.*

3. M. was indicted under the Penal Code for participating in an unlawful assembly. The meeting in question took place the day before the hanging of the Chicago anarchists. It was attended by from eighty to one hundred people, mostly anarchists, in sympathy with M., who openly avowed himself to be one. When he entered, the persons present hailed him as their leader, and when he denounced the authorities as the murderers of their "friends and comrades" and threatened revenge, they applauded and cheered him. *Held*, that there was sufficient evidence of the requisite concurrence of the statutory number to go to the jury. *Id.*

4. M., in his speech, denounced the government, the officers of the law and the judges concerned in the trial, advised his hearers to arm and be prepared for the revolution "not far distant," and declared that they would avenge the blood of their comrades, and declared that the governor of Illinois would not be "spared" in the general destruction. He referred to the "police bloodhounds," and exclaimed, "God help them if they are found in our socials." The audience exhibited by their cheers and appearance warm approval of these sentiments, and when the speaker said the day of revolution was "not far distant" one of them said excitedly: "Why not to-night, for we are ready and prepared." *Held*, that the evidence was sufficient to warrant a finding by the jury that these utterances were used and understood as threats; and that such a finding was conclusive upon this court. *Id.*

5. It is not essential to the validity of a sentence in a capital case that it shall state the mode in which the death penalty is to be inflicted; a statement that it shall be in the "mode by law prescribed and provided" is sufficient. *People* v. *Trezza*. 529

6. It is not error for a court to refuse to embody the language of an elementary writer in a charge to the jury; the trial judge may select the words in which he chooses to express his views of the law, and unless he lays down incorrect propositions, or refuses to instruct them as to pertinent, material and necessary points, there is no error calling for the interposition of an appellate court. *People* v. *Wayman*. 585

DAMAGES.

Defendant herein set up as a counter-claim damages for an alleged breach of a contract upon the part of plaintiff not to manufacture certain machines from defendant's patterns, except for him or upon his order. *Held*, that the damages to which defendant was entitled, assuming a breach of the contract was shown, were simply the profits he would have received had the sale been by him; that he could not include royalties or other incidental advantages; and that as the damages were unliquidated it would not carry interest upon a recovery. *Blake* v. *Krom*. 64

DEBTOR AND CREDITOR.

1. The provisions of the act in reference to chattel mortgages (Chap. 279, Laws of 1833, as amended by chap. 418, Laws of 1879), declaring such a mortgage absolutely void as to creditors of the mortgagor unless filed and refiled as prescribed, confers no title to the mortgaged property upon the creditors and they take no interest by virtue of the act; its effect is simply that in the cases mentioned, as between the creditors and the mortgagor, the mortgage has no force and is to be treated as if it had never existed. *Tremaine* v. *Mortimer*. 1

2. The mortgagors as well as the creditors can make this claim, and before the creditors acquire liens upon the property by virtue of executions or other process, the mortgagor may sell or assign and convey an absolute title, or he may deliver the property to the mortgagee in payment of his debt. *Id.*

3. A creditor may not, therefore, seize the property under an execution in his favor and at the same time deny that the mortgagor has any title. *Id.*

4. A creditor seeking to recover of his debtor a balance alleged to be due, where the amount of the indebtedness to him is undisputed, should not be turned out of court because he does not show how much should be deducted therefrom by way of credit. *Cheever* v. *Brown*. 670

See ASSIGNMENT (FOR BENEFIT OF CREDITORS).
COMPOSITION.
CREDITOR'S SUIT.

DECEIT.

See FRAUD.

DEED.

1. Where a highway is the dividing line between the lands of two adjoining proprietors, each owning to the center, and one of them conveys, bounding the lands along or upon the highway, in the absence of an express reservation in the deed, of his property in the highway, the deed conveys the fee to the center, subject to the public easement. *Haberman* v. *Baker*. 253

2. Where the grantor owns the fee of the soil of the whole highway, in the absence of facts raising a presumption of a contrary intent, the presumption is that the grantor intended to and the conveyance will be deemed to convey the fee of the whole highway. *Id.*

3. In either case, where by the abandonment of public easement the highway ceases to exist, the land comprising it reverts to the primary condition of ownership and of use, and becomes a parcel of the adjoining property, and the grantee is entitled to the possession of that portion conveyed by his deed. *Id.*

4. Where, therefore, certain lands in the city of New York were conveyed, bounded on the westerly side by an old road, title to the center whereof was in the grantor, and on the north by a road leading eastwardly from the other, title to the whole of which was in the grantor, and where, in the subsequent laying out and opening of city streets, the public use of pieces or gores of land, parts of the old road included in said titles, was abandoned, *held*, that the right to such use reverted to the successor in title to said grantee; that he had a full title to and right to convey the land bounded by the new streets; and so, was entitled to a judgment requiring a specific performance of a covenant for the purchase thereof. *Id.*

5. *It seems*, the rule is different where the description in a deed bounds the land by the side of the highway, or where there is a city street the title to which is in the municipality. *Id.*

6. The heirs of the decedent, therefore, or his residuary devisees, take no direct interest therein, and it is not essential in order to convey a

good title for them to join in a conveyance of the premises. *Id.*

7. Nor is such joinder required because of the fact that the mortgagee took possession of the mortgaged premises, unless it appears that such possession had been for a sufficient length of time to give title by adverse possession. *Id.*

8. A general warranty in a deed, not limited by other parts thereof, however it technically operates, is only consistent with an intention of the grantor to convey the whole estate. *Thompson* v. *Simpson.* 270

9. The rule that there is no estoppel where an interest passes, does not apply to conveyances intended to pass the whole title, although the grantor had a limited interest which was carried by the conveyance. *Id.*

10. Where, however, one without title or authority from the real owner to sell, assumes to sell and convey land in fee, and the owner, knowing the facts, consents to and does accept the proceeds of the sale in full satisfaction of his interest, this operates as a confirmation of the unauthorized sale, and precludes the owner from asserting his legal title. *Id.*

11. "Mary E.," the wife of T., died in 1845 seized of certain premises in the city of New York, the title to which vested in her upon the death of E., her mother. The title descended upon the death of "Mary E." to her five infant children, subject to the life estate of her husband, as tenant by the curtesy; he married again, his second wife having the same baptismal name and middle initial as the first, *i. e.*, "Mary E." In 1853, T. and his wife joined in a warranty deed of the premises, her name being given therein as "Mary E." T. represented to the grantees that his wife named in the deed was the sole surviving child of E. and that the property belonged to her, and in the deed the devolution of title was recited. The grantees purchased in good faith, paying a consideration, which was the full value of the premises. The grantees took possession, built upon and thereafter transferred the property, neither they nor their successors in interest having any knowledge of the fraud or the defect in their title until after the death of T. who died in 1882. In an action of ejectment thereafter brought by the children of the first wife, *held*, that the grantees of T. acquired under their deed only his life estate; that the title of the children was unaffected by the fraud committed by him, and the deed was no obstacle to a recovery by them of their inheritance on the termination of the life estate; also that their right of action did not arise until after the death of their father, and so that the Statute of Limitations was not a bar to the action; that the execution by him of a deed purporting to convey a greater estate than he possessed did not operate as a forfeiture of that estate (1 R. S. 739, § 145), but passed it to the grantees. *Id.*

12. The trial court found, upon evidence sufficient to sustain the findings, that the consideration received by T. went into other property which the plaintiffs, with knowledge of the facts, accepted in substitution for their interests. *Held*, that plaintiffs were thereby precluded from asserting their title; that while the death of T. only conveyed his life estate, it purported to convey and it was the intent of the grantors to convey the entire fee, and so, the grantees were entitled to avail themselves of the equities growing out of the disposition of the proceeds. *Id.*

13. The provision of the Revised Statutes (1 R. S. 739, § 143), providing that no greater interest shall pass by a grant or conveyance than the grantor himself possessed or could lawfully convey at the time of the delivery of the deed, although it undertakes to convey a larger interest, was simply intended to do away with the common-law doctrine whereby a feoffment by a life tenant or by a person in possession of lands, and other common-law modes of assurance by fine and delivery, had

the power of creating an estate in fee, divesting the title of the true owner. *Id.*

See COMPTROLLER'S DEED.

DEFENSES.

1. Under a liquidation agreement between a corporation and its creditors, plaintiffs were appointed trustees. In an action upon certain promissory notes given for property purchased by defendant of the trustees after they had assumed the trust, the answer alleged that defendant, as creditor, was induced to become a party to the liquidation agreement by false representations, and asked to have the same set aside and canceled as to him. *Held*, that a demurrer to the answer was properly sustained; that it set up no defense, as fraud inducing the execution of the contract was no answer to defendant's obligation to pay for property purchased of the trustees. *Otis* v. *Shants*. 45

2. The doctrine of acquiescence as a defense to an equity action is limited to actions of an equitable nature exclusively, or to those where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. *Galway* v. *Met. E. R. Co.* 132

3. Where a legal right is involved, and upon grounds of equity jurisdiction the courts have been called upon to sustain the legal right, the mere *laches* of a party, unaccompanied by circumstances amounting to an estoppel, constitute no defense. *Id.*

DEFINITIONS.

1. The word "willfully" in the provision of the Penal Code (§ 639), declaring that "any person who willfully or maliciously displaces, removes, injures or destroys * * * a pipe or main for conducting water or gas * * * is punishable by imprisonment," means not simply a voluntary and intentional act, which is in fact wrongful, but one done with a wrongful purpose, with a design to injure another, or from mere wantonness or lawlessness. *Wass* v. *Stephens*. 123

2. In the provision of the Code of Civil Procedure (§ 738), authorizing an offer of judgment by a defendant and providing that if plaintiff does not serve notice of acceptance and "fails to obtain a more favorable judgment, he cannot recover costs from the *time of the offer*, but must pay costs from that time," the words "time of the offer" mean "date of the offer;" it speaks as of the date when it was made. *Lynk* v. *Weaver*. 171

DEMURRER.

See PLEADING.

DISORDERLY HOUSES.

See BAWDY HOUSES.

DURESS.

1. A contract obtained by duress is not ordinarily void, but merely voidable, and may be subsequently ratified and confirmed, and the party claiming to have been constrained, by afterwards voluntarily acting upon it, thereby affirms its validity and loses the right to avoid it. *O. P. R. R. Co.* v. *Forrest*. 83

2. One entitled to repudiate a contract on the ground of duress, should act promptly. *Id.*

3. Plaintiff's complaint set forth a cause of action for malicious prosecution and alleged that plaintiff had executed a release thereof, which release was extorted by threats and under duress. The relief asked was that the release be canceled and damages awarded for the malicious prosecution. It appeared that the release was executed after bail had been given by plaintiff on his arrest and against the advice of his counsel. *Held*, that a finding that plaintiff executed said release

freely and willing and without coercion or fear, was justified. *Stono* v. *Weiller*. 655

EASEMENTS.

1. Owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil are entitled to the benefit of the street in front of their premises for access and other purposes, and cannot be deprived thereof without compensation. *Reining* v. *N. Y., L. & W. R. Co.* 157

2. The right of such owners is not so absolute in its character that they can resist or prevent any and all interference with the street, to their detriment; nor can they assert it to stay the municipality in the control, regulation or improvement of the streets in the public interests, although it may be made to appear that the privileges said owners had enjoyed and the benefits they had derived from the street would be curtailed or impaired, to their injury, by the changes proposed. *Id.*

3. As against abutting owners, having no title to the bed of a city street, it is competent for the legislature to authorize the construction of a horse or steam surface railroad therein, without making compensation to them for consequential damages arising from a reasonable use of the street for purposes of such a railroad, not exclusive in its nature, and when the road is substantially on the same grade as the street itself and passage across and through the same is left free and unobstructed for the public use. *Id.*

4. Where, however, the street is practically and substantially closed against such owners for ordinary street uses, they are entitled to compensation. *Id.*

See HIGHWAYS.

ELECTION OF OFFICERS.

1. By the charter of the village of Wellsburg (Chap. 291, Laws of 1870, as amended by chap. 68, Laws of 1887, and chap. 172, Laws of 1888), every person elected or appointed to office is required to take and file with the clerk of the village an oath of office. By an ordinance of the board of trustees authority was conferred upon said clerk to administer such oath. A majority of the inspectors of election signed a statement as to the results of an annual election for village officers, which was filed with the clerk; this showed that there were one hundred and thirty-six ballots cast for president, of which sixty-six were cast for the relator, "Morris A. Young," one for "Morris Young," one for "M. A. Young," one was defective, and one blank. Defendant, the village clerk, when applied to for that purpose, refused to administer the oath of office to the relator, claiming that he was not legally elected. *Held*, that a mandamus was properly granted, requiring defendant to perform this duty; that he was not called upon to decide as to the legality of the plaintiff's election; but, in his ministerial capacity, was obliged to administer the oath, if *prima facie*, it appeared, as it did in this case, that the individual desiring to be sworn had the greatest number of votes, at least if he was not known to be ineligible; also, that a certificate from the inspectors as to the relator's election was not requisite. *People ex rel.* v. *Straight*. 545

2. As to whether the clerk might refuse to administer and file such oath, if the applicant was known to be ineligible, *quære*. *Id.*

EMINENT DOMAIN.

1. *It seems* that generally the question as to whether the use to which private property is proposed to be devoted by legislative power is public or private, is a judicial one and the courts are not concluded by any declaration of the law-making power as to the nature of the use. *Waterloo W. M. Co.* v. *Shanahan*. 345

2. Property required by the state for canal purposes may be taken in a summary way without the aid of judicial proceedings; the title or the right to the use may be acquired at any time, and need not be obtained in advance. *Id.*

3. A contemplated possible limited use by a few, and not then as a right but by way of permission or favor, is not a public use, and so is not sufficient to authorize the taking of private property against the will of the owner. *In re S. R. Cable R. Co.* 408

4. Upon an application to appoint commissioners to appraise private property sought to be acquired by a corporation organized under the act of 1888 (Chap. 462, Laws of 1888), which authorizes the formation of elevated tramway corporations for the transportation of freight and the condemning of private lands for the corporate purposes, these facts appeared: The petitioner's articles of association state that it was formed for the purpose of constructing maintaining and operating an elevated tramway between two points specified, "a distance of about four miles." The map originally filed, and the only one filed, did not include the lands in question. The tramway had been built and was in operation for a distance of about three and one-half miles. One of the termini was upon the lands of a manufacturing corporation, the other upon the lands of the petitioner, near the manufactory of said corporation. The incorporators of the petitioner were stockholders, interested in said corporation, and the petitioner was organized and thus far has been operated exclusively as an instrumentality to facilitate the business of the corporation. The lands sought to be acquired were to increase the petitioner's terminal facilities at the northern terminus of its road. There is no public highway leading to this terminus. All that was claimed by the petitioner was that the surplus of the capacity of the road, after supplying the wants of said manufacturing corporation, was to be let to some one individual engaged in selling coal, to be used in transporting that article. As to whether there would be any such surplus or whether it could be availed of by the public, did not appear. It also appeared that the petitioner had lands which could be used for the purpose for which the land in question was desired, but not as conveniently. *Held*, that the use for which the land was sought to be acquired was not public, but private, and that the petitioner's application was properly denied. *Id.*

5. A railroad corporation duly organized under and in pursuance of the "Rapid Transit Act" (Chap. 606, Laws of 1875), acquires by the act of incorporation, and upon obtaining the necessary consents of the public authorities and the property owners, an indefeasible right to construct its road upon the route or routes designated in its articles of incorporation; the lands necessary for the purpose are by the sovereign power appropriated to that exclusive use, and a lien is impressed upon them in favor of the corporation, which ripens into title through purchase or condemnation proceedings; the subsequent condemnation of the lands in the course of the railroad construction is merely incidental, in order to compensate property holders. *Suburban R. T. Co.* v. *Mayor, etc.* 510

6. The distinction between such a corporation and one organized under the General Railroad Act pointed out. *Id.*

7. Prior to the passage of the act of 1884 (Chap. 522, Laws of 1884), providing for the laying out of new parks in the city of New York, plaintiff had been organized under the "Rapid Transit Act;" one of its routes, as located by the articles of association and to which the necessary consents of the public authorities and property holders had been obtained, ran through private grounds. These were included in one of the parks designated in said act; subsequent to its passage, plaintiff, by condemnation proceedings, acquired the right to the strip of land over

which the route was located. The commissioners of estimate, appointed under the act of 1884, made an award to plaintiff, as the value of the strip, which it refused to receive. The city authorities, claiming to have acquired the fee, took possession of the strip and prevented plaintiff from proceeding with its work of construction thereon. In an action to determine the rights of the parties, *held*, that plaintiff, by and upon its organization, became possessed of the absolute and exclusive franchise to construct, operate and maintain its road over the strip in question, which operated to vest in it a legal right to have said strip; that said franchise was not impaired by the fact that the work of actual construction had not been commenced or the land condemned before the passage of the act of 1884, and plaintiff was not divested thereof by the proceedings under said act; that it was inoperative to take away or to authorize a deprivation or curtailment of such right; that it was not necessarily to be inferred from the language of the act that it was the legislative intent to destroy the prior public use included in plaintiff's franchise, but rather that the two uses should stand together; and that the appropriation for a public park was intended to be subject to the exercise by the plaintiff of its franchise. *Id.*

EQUITY.

1. The doctrine of acquiescence as a defense to an equity action is limited to actions of an equitable nature exclusively, or to those where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. *Galway* v. *Met. E. R. Co.* 132

2. Where a legal right is involved, and upon grounds of equity jurisdiction the courts have been called upon to sustain the legal right, the mere *laches* of a party, unaccompanied by circumstances amounting to an estoppel, constitute no defense. *Id.*

3. The rule requiring promptness in soliciting the intervention of a court of equity, is always addressed to the discretion of the court and varies according to the situation of the parties, the nature of the relief demanded and the circumstances of the case. *Id.*

4. A court having authority to grant a perpetual injunction to restrain such continuous trespasses, does not impair the exercise of its authority by permitting, and it may permit, the wrong-doer to escape its effect by voluntarily paying the owner a specified sum for the property injured. *Id.*

See INJUNCTION.
SPECIFIC PERFORMANCE.

ERROR.

Upon the trial of an action for the conversion of a quantity of lumber, which plaintiffs claimed had been sold by defendant to G. & E. H., their assignors, defendant claimed that it was the intention and agreement of the parties that it should retain the title to the lumber until it had been used in the construction of two boats which G. & E. H. had contracted to build for it. The plaintiff offered in evidence an order addressed to defendant's agent for the lumber; also a bill therefor sent by defendant, in which G. & E. H. were specified as debtors to defendant for the lumber, the items of which were stated, with the prices. Defendant then offered to show by its agent, who sent the bill, that it was sent merely as a memorandum of the value of the lumber, and to notify G. & E. H. for what amount they would be required to account on the settlement of the boat contract. This offer was overruled and the evidence excluded. *Held*, error. *Crosby* v. *Prest., etc., D. & H. C. Co.* 641

ESTOPPEL.

1. Neither the verdict of a jury nor the findings of a court in a prior action upon the precise point involved in a subsequent action between the same parties constitute

a bar, unless followed by a judgment based thereon, or into which the verdict or findings entered; the judgment is the bar, not the preliminary determination of the court or jury. *Springer* v. *Bien*. 99

2. So also, although a judgment has been entered in a prior action, it does not prevent the re-litigation of a fact litigated and found in such action, which was wholly irrelevant to the issues therein, and did not enter into and was not involved in the final judgment. *Id.*

3. The rule that there is no estoppel where an interest passes by a deed does not apply to conveyances intended to pass the whole title, although the grantor had a limited interest which was carried by the conveyance. *Thompson* v. *Simpson*. 270

4. The Statute of Frauds is not an obstacle to the enforcement by a court of equity of the doctrine that the owner of land may by his acts preclude himself from asserting his legal title against one who, in reliance thereon, has placed himself in a position where to allow the legal owner of the land to assert his right would operate as a fraud upon the other party; that court will not permit a statute made for the prevention, to be used as an instrument, of fraud. *Id.*

5. *It seems*, a party is concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and which did so influence it, where such denial would operate to the injury of the latter. *Id.*

6. *It seems* also, an estoppel may arise, although there was no designed fraud on the part of the person sought to be estopped; it may arise also where there is a duty to speak and the party upon whom the duty rests has an opportunity and knowing the circumstances requiring him to speak, keeps silent, and it is not necessary that the duty to speak should rest upon any agreement, or legal obligation; it arises whenever principles of natural justice require the disclosure. *Id.*

7. The owner, however, of property which another has assumed to convey without authority, is not precluded by mere silence from subsequently claiming it. There must have been an occasion and duty to speak, and it must appear that such omission, upon opportunity presented, was intentional, or in negligent disregard of the plain dictates of conscience and justice. *Id.*

8. The mere fact that another may act to his prejudice, if the true state of things is not disclosed, does not render silence culpable, or sufficient to estop the true owner; he owes no duty of active diligence to protect the other party from injury. There must be a standing by and encouragement or acquiescence by the true owner in acts inconsistent with his right, knowing that the other party, acting under a false impression, is about to do what will result in his injury. *Id.*

9. The doctrine of equitable estoppel, when invoked to bar the legal title to land, should be cautiously applied, and only when the grounds for its application are clearly and satisfactorily established. *Id.*

10. Where, however, one without title or authority from the real owner to sell, assumes to sell and convey land in fee, and the owner, knowing the facts, consents to and does accept the proceeds of the sale in full satisfaction of his interest, this operates as a confirmation of the unauthorized sale, and precludes the owner from asserting his legal title. *Id.*

11. "Mary E.," the wife of T., died in 1845, seized of certain premises in the city of New York, the title to which vested in her upon the death of E., her mother. The title descended upon the death of "Mary E." to her five infant children, subject to the life estate of her husband, as tenant by the curtesy; he married again, his sec-

ond wife having the same baptismal name and middle initial as the first, *i. e.*, "Mary E." In 1853 T. and his wife joined in a warranty deed of the premises, her name being given therein as "Mary E." T. represented to the grantees that his wife named in the deed was the sole surviving child of E., and that the property belonged to her, and in the deed the devolution of title was recited. The grantees purchased in good faith, paying a consideration, which was the full value of the premises. The grantees took possession, built upon and thereafter transferred the property, neither they nor their successors in interest having any knowledge of the fraud or the defect in their title until after the death of T. who died in 1882. In an action of ejectment thereafter brought by the children of the first wife, the trial court found, upon evidence sufficient to sustain the findings, that the consideration received by T. went into other property which the plaintiffs, with knowledge of the facts, accepted in substitution for their interests. *Held*, that plaintiffs were thereby precluded from asserting their title; that while the death of T. only conveyed his life estate, it purported to convey and it was the intent of the grantors to convey the entire fee, and so, the grantees were entitled to avail themselves of the equities growing out of the disposition of the proceeds. *Id.*

12. In an action to recover the possession of personal property, defendant gave an undertaking for the return of the property, which contained a recital admitting that plaintiffs had taken the property described in his affidavit and requisition from defendant's possession. Upon the trial, defendant offered to prove that he did not have in his possession, when demand was made upon him, more than one-quarter of the property mentioned in plaintiffs' affidavit, which offer was rejected, upon the ground that the admission was conclusive. Thereafter defendant, with the consent of his sureties, moved at Special Term for leave to substitute a new undertaking without the admission, in place of the original. The motion was denied upon the ground that as the court had held the admission conclusive, the court had no power to grant it. *Held*, error; that it was conclusive only until set aside, and as to whether or not this should be permitted, rested in the discretion of the Supreme Court. *Dale* v. *Gilbert*. 625

13. A written agreement, while it exists, must control as to all the terms expressed in it, although those terms differ from the prior oral agreement. If the difference was caused by mutual mistake, it is necessary to reform the contract so as to express the true agreement. *Linton* v. *Unexcelled Fire Works Co.* 672

EVIDENCE.

1. The provision of the Code of Civil Procedure (§ 835) prohibiting an attorney from disclosing professional communications made to him by his client does not apply, as between the parties, to communications made by two or more persons in consultation with an attorney for their mutual benefit; it cannot be invoked in any litigation which may thereafter arise between such persons, although *it seems* it may in a litigation between them and a stranger. *Hurlburt* v. *Hurlburt*. 420

2. Where testimony of the attorney as to communications so made would have been competent in an action between such persons, it is also competent in an action between their personal representatives as such; and this, although the parties to the latter action are personally interested. *Id.*

3. The declarations of a testator or intestate, binding him or binding and impairing his estate, may be given in evidence against his personal representatives, in all cases where they would have been competent against himself, if he had been living and a party to the action. *Id.*

4. In an action by an abutting owner to restrain the operation and main-

tenance of an elevated railroad in a street, the opinion of an expert as to what would have been the value of plaintiff's property had defendant's road not been built and operated is incompetent testimony. (RUGER, Ch. J., and GRAY, J., dissenting.) *Roberts* v. *N. Y. E. R. Co.* 455

5. In an action by an abutting owner to restrain the operation of an elevated railroad in a city street, the opinion of an expert as to what plaintiff's premises would have been worth without the road is not competent evidence. *Doyle* v. *Manhattan R. Co.* 488

6. *It seems* it is competent for such witnesses to give opinions as to the present and past value of the property, based upon facts they have observed, but it is improper to permit them to speculate as to the facts and then base a speculative opinion thereon. *Id.*

7. In such an action it is competent for either party to show the general effect of the operation of the road upon other premises abutting upon the street, in the vicinity of, and similarly situated with plaintiff's, where it appears that damages claimed by plaintiff, if actually sustained, must have been common in the vicinity along the street. *Id.*

8. But *it seems* that while the court may not confine the examination to the premises in question and exclude all proof offered as to the general effect upon other premises, it may, in the exercise of its discretion, confine the examination to premises in the vicinity, giving a reasonable range, and may limit the number of witnesses. *Id.*

9. It is competent also to prove, where plaintiff's premises are fitted and occupied in part for business purposes, the effect of the operation of the road upon the business and traffic in the streets. *Id.*

10. *It seems* that in such case the witnesses should be confined mainly to giving observed facts, and that they should not be permitted to give mere speculative opinions. *Id.*

11. In an action by an abutting owner to restrain defendant from the maintenance and operation of its elevated road in a street, a witness was asked and permitted to answer, under objection and exception, as to what, in his opinion, was the best use to which the plaintiff's property "could have been put if it had not been for the elevated railroad and this interference." *Held*, error. *Gray* v. *Manhattan R. Co.* 499

12. A medical expert may properly give his opinion, as a witness, as to the natural and reasonably certain consequences to be expected from physical injuries, also upon a hypothetical case presented by a question predicated upon facts disclosed by the evidence. *Wallace* v. *Vacuum Oil Co.* 579

EXECUTION.

1. The provision of the Code of Civil Procedure (§ 1440) relating to the title to real property sold on execution, as amended in 1881 (Chap. 631, Laws of 1881), which provides that if the title of the sheriff's "grantee or his assignees is adjudged for any reason or cause whatever to be null and void in any action for that purpose brought by the judgment debtor or his assignees, such judgment shall have no force or effect unless within twenty days after the entry" or in case of pending appeal, within twenty days after final judgment "the plaintiff shall pay to such grantee or his assignees the * * * money * * * paid on the sale, with interest from the time of the sale, * * * including the costs and expenses of defendant in defending the action, * * * and in the event of the plaintiff's failure to pay such purchase-money and expenses within the time aforesaid, said title shall be valid in said grantee," is unconstitutional and void; it violates the constitutional prohibition against depriving the owner of his property without due process of law, and it assumes to nullify a final and unimpeachable judgment. It is also objectionable by reason of the ambiguity of the provision

relating to the time limited for making the payments required by it. *Gilman* v. *Tucker*. 190

EXECUTORS AND ADMINISTRATORS.

1. Under the provision of the Code of Civil Procedure (§ 2699), declaring that "before ancillary letters of administration are issued, the person to whom they are awarded must qualify in the manner prescribed for the qualification of an administrator upon the estate of an intestate, except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of this state," the power of the surrogate is not limited to requiring a bond not exceeding twice the amount appearing to be due to residents. *In re Prout*. 70

2. Said provision was intended to give the surrogate a discretion to modify the general rule (§ 2667), which requires a bond in a penalty not less than twice the value of the personal property and to accept one less in amount if, by reason of adequate security having been already given, additional security for the protection of the general interests is not in his judgment required, or where the next of kin have consented to waive security, and in the case of domestic creditors, where their protection was the only interest involved, to prescribe a limit beyond which security should not be exacted. *Id.*

3. Where, therefore, adequate security to protect the general interests had not been given, and other interests aside from those of domestic creditors were involved, *held*, that the surrogate had power to require as a condition of granting ancillary letters, a bond in the penalty of double the value of the personalty in this state. *Id.*

4. *It seems* that where, upon foreclosure of a mortgage belonging to the estate of a decedent, the mortgaged premises are bought in by the personal representatives, they take on the character of the mortgage indebtedness, and so are as personalty in his hands, which he may dispose of, and for which he is liable to account as such; and this is so, although the decedent left a will which confers no power upon his executors to sell real estate. *Haberman* v. *Baker*. 253

5. The heirs of the decedent, therefore, or his residuary devisees, take no direct interest therein, and it is not essential, in order to convey a good title, for them to join in a conveyance of the premises. *Id.*

6. Nor is such joinder required because of the fact that the mortgagee took possession of the mortgaged premises, unless it appears that such possession had been for a sufficient length of time to give title by adverse possession. *Id.*

7. The agreement upon which this action was brought was that C., defendant's testator, would pay all the debts allowed or legally established against the estate of S., plaintiff's testator. *Held*, that the decree upon the judicial settlement of the accounts of S., to which accounting S. was made a party, was conclusive as to the amount of debts legally established. *Lawrence* v. *Church*. 324

8. By the agreement C. was to have the benefit of a mortgage belonging to the estate, or the proceeds, if any, after paying the legal and proper expenses and commissions in collecting the mortgage. A demurrer was interposed by the defendant to the complaint herein, which was sustained, with leave to plaintiffs to amend. Upon the accounting plaintiffs were allowed the expenses of their unsuccessful defense to the demurrer, and these were allowed them herein as expenses of administration. *Held*, error; that while such expenses were properly allowed to plaintiffs on their accounting, as between the parties here they could not be regarded as expenses of administration. *Id.*

9. But *held*, that with this exception the decree was conclusive evidence as to what the proper and legal expenses of administration were. *Id.*

10. The decree was entered subsequent to the commencement of this action, and it allowed as necessary expenses of administration disbursements made by plaintiffs after the action was commenced. *Held*, that in order to prove such items by the decree, application should have been made by plaintiffs under the provisions of the Code of Civil Procedure (§ 544), for leave to permit them to make a supplemental complaint, alleging the entry of the decree as a material fact which occurred since the former complaint was made. *Id.*

11. The declarations of a testator or intestate, binding him or binding and impairing his estate, may be given in evidence against his personal representatives, in all cases where they would have been competent against himself, if he had been living and a party to the action. *Hurlburt* v. *Hurlburt*. 420

12. The executors and trustees under the will of T. brought an action for its construction asking the court to determine which of two parties was entitled to a certain fund in plaintiffs' hands as trustees. The judgment rendered decided the question, and this was acquiesced in by both of the alleged claimants to the fund, who were parties and were of age. *Held*, that as under the Code of Civil Procedure (§ 1294) the right to appeal is limited to "a party aggrieved," and as plaintiffs were not aggrieved by the judgment within the meaning of said Code, they were not entitled to appeal. *Bryant* v. *Thompson*. 426

13. One S., a resident of Scotland, died there in 1881, leaving a will which appointed as sole executrix a resident of that country. All the residuary legatees were and still are residents of this state. Letters testamentary were issued to the executrix, and in 1882 ancillary letters of administration were issued by the surrogate of the county of New York to C., the petitioner herein, a resident of this state, who accepted and has continued to act thereunder. At the time of his death, S. owned personal property in this state, consisting mostly of debts due him from residents. In a proceeding to review an assessment, made in 1890, of said assets which had remained in C.'s hands against him as administrator, *held*, that the property was properly so assessed (1 R. S. 419, § 3); that C. was not entitled to exemption as an agent having moneys, in his possession or under his control, transmitted to him for investment or otherwise (1 R. S. 389, § 5); also that a sufficient period had elapsed since C.'s appointment to change the original character of the funds, assuming that they had been sent here and placed in his hands for investment, that it was his duty as administrator to distribute the assets as directed by the will subject to the lawful orders of the surrogate and to the rights of resident creditors, and the resident distributees could not, by leaving them in his hands, escape taxation. *People ex rel.* v. *Coleman*. 524

—— *Where in action brought by executor for construction of will, it was found that the action was not brought in good faith, held that plaintiff was properly charged individually with costs.*

See Garlock v. *Vandevort*. 372

EXPERTS.

1. In an action by an abutting owner to restrain the operation and maintenance of an elevated railroad in a street, the opinion of an expert as to what would have been the value of plaintiff's property had defendants' road not been built and operated is incompetent testimony. (RUGER, Ch. J., and GRAY, J., dissenting.) *Roberts* v. *N. Y. E. R. R. Co.* 455

2. In an action by an abutting owner to restrain the operation of an elevated railroad in a city street, the

opinion of an expert as to what plaintiff's premises would have been worth without the road is not competent evidence. *Doyle* v. *Manhattan R. Co.* 488

3. *It seems* it is competent for such witnesses to give opinions as to the present and past value of property based upon facts they have observed, but it is improper to permit them to speculate as to the facts and then base a speculative opinion thereon. *Id.*

4. A medical expert may properly give his opinion, as a witness, as to the natural and reasonably certain consequences to be expected from physical injuries, also upon a hypothetical case presented by a question predicated upon facts disclosed by the evidence. *Wallace* v. *Vacuum Oil Co.* 579

FALSE IMPRISONMENT.

1. In an action for false imprisonment it appeared that the defendant V. appeared before the defendant C., a justice of the peace, and made a sworn complaint against the plaintiff, charging him with supplying diluted milk to a butter factory in violation of the act of 1885 (Chap. 183, Laws of 1885), which makes such an act a misdemeanor. C. issued a warrant. Plaintiff was arrested, and on being arraigned pleaded not guilty; he waived a preliminary examination and offered bail for his appearance before the next grand jury. The district attorney, who appeared for the people, claimed that the justice had exclusive jurisdiction. The offer was overruled, and plaintiff thereupon demanded a jury, which was summoned; he was tried, found guilty on the trial, sentenced to pay a fine, and to be imprisoned until it was paid, not to exceed ninety days; and thereupon he was taken to and confined in the county jail until his discharge was procured. The conviction was affirmed by the Court of Sessions of the county, but was reversed by the General Term. *Held*, that while C. erred in trying plaintiff after his offer of bail, he did not render himself liable in damages, and that the complaint was properly dismissed. *Austin* v. *Vrooman.* 229

2. The distinction between such a case and one where the justice proceeds without jurisdiction of the subject-matter and the person, pointed out. *Id.*

FINES.

In an action brought by the attorney-general, under the Code of Civil Procedure (§§ 1948, 1949), to try the title to certain elective offices in a religious corporation, the complaint demanded costs against the defendants, of whom there were ten, and that each of them be required to pay to the state a fine of $2,000, as authorized by the Code (§ 1956). It did not appear that the offices in litigation were of any value in themselves, or that there were any emoluments or pecuniary advantages attached to them. The complaint was dismissed and an extra allowance of $350 was made, based upon the ground that the complaint contained a claim of $20,000. *Held*, error; that the demand in the complaint that the defendants be fined was not a claim that could form the basis of an extra allowance; that the fine was not a part of the cause of action or claim, but a mere incident to success in the action, resting wholly in the discretion of the court, which, if plaintiff had succeeded, could have been imposed whether alleged in the complaint or not; and that by demanding it, plaintiffs did not engraft upon the complaint any element of a pecuniary claim within the meaning of that term as used in the provision of said Code (§ 3253), authorizing an extra allowance. *People ex rel.* v. *Adams.* 129

FISH AND FISHERIES.

1. In an action to recover a penalty for an alleged violation of the provision of the statute in relation to fishing with nets in the fresh waters of this state (§ 23, chap. 534, Laws of 1879, as amended by chap. 127,

Laws of 1884), which prohibits the catching or killing of any fish, with certain exceptions, among which are "suckers," in any way except by angling with a hook and line, in any of the fresh waters of the state, except certain places named, among which W. creek was not included, it was claimed that defendant had caught suckers with a net in W. creek, and had thereby rendered himself liable to the penalty prescribed by the statute; that the court should strike out the word suckers from the exceptions in the prohibitory clause, as in no other way could effect be given to certain other clauses in the form of exceptions contained in the statute, which provide that, in waters specified, it shall be lawful for certain persons to possess and fish for suckers with a seine or spear during certain months. *Held*, untenable; that the purpose of the clauses referred to was simply to limit and restrict, in the places named, the license to catch suckers given by the general exception. *People* v. *Tanner*. 416

2. The complaint also demanded the penalty imposed by said statute (§ 23) upon one having a net in his possession on the shores of waters inhabited by black or Oswego bass. The only proof introduced by plaintiff to show that the creek was inhabited by said bass, was that of a witness, who testified that he had once caught them therein, above the dam, which is near a river inhabited by them, and into which the creek empties. Defendant proved by several witnesses, who had fished in W. creek for many years, that they had never caught any of said bass in the creek, or seen any that had been caught there. The question was submitted to the jury and they found in favor of defendant. *Held*, no error. *Id.*

FLATBUSH (TOWN OF).

1. The subject expressed in the title of the act entitled, "An act in relation to local improvements in the town of Flatbush and the acquisition of the rights of a plank-road company in said town" (Chap. 161, Laws of 1889), properly embraces the building and improvement of highways and the construction of sewers, and the act is not made repugnant to said constitutional provision because it contains a provision authorizing the construction of a trunk sewer through the adjoining town of Flatlands, a necessary part of the sewage system provided for in the act. *Van Brunt* v. *Town of Flatbush*. 50

2. But *held*, that under said act a sewer could not be constructed in an avenue in the town of Flatlands without the consent of the owners of the soil or the acquisition of the title of such owners in the mode provided by the act; and this, without regard to the question as to whether said avenue is to be treated as a country highway simply or as an urban street; that considered as such a street, as the sewer was in no way for the benefit of the owners of the lands in Flatlands through which it passes, or for the benefit of that town, but belongs to the town of Flatbush and is exclusively for the benefit of its inhabitants, the principles justifying the use of city streets for sewers did not apply. *Id.*

FLATLANDS (TOWN OF).

See FLATBUSH (TOWN OF).

FORECLOSURE.

1. In an action for the foreclosure of a mortgage it appeared that $55,000, the amount to secure which the mortgage was given, was by its terms to be advanced to the mortgagors in seventeen specific installments, dependent upon different stages of the work of constructing a building upon the mortgaged premises, which was to be the chief security for the loan. When the advances amounted to about $40,000 a lien for materials furnished and services performed was filed. The mortgagees thereupon declined to make any further advances, and a contract was then entered into by which the lienor agreed to subor-

dinate its lien to the further advances called for by the mortgage, and the mortgagees agreed to pay said lien in specified proportions out of the fifteenth and sixteenth installments when they should be earned and become due, and they accepted an order upon them payable out of said installments when due. The mortgagors never earned or became entitled to these installments, but the mortgagees advanced to them the amount secured by the mortgage, and $10,000 more, less the amount of the lienor's claim, to be used in the prosecution of the work, under an agreement with said lienor that the claim should be paid out of said $10,000. The lienor was made defendant, but no personal judgment asked against it; it set up its claim as a counter-claim and asked for a money judgment. The counter-claim was dismissed. A judgment of foreclosure and sale was ordered for the amount of the mortgage and interest, and the surplus ordered to be brought into court. *Held*, no error; that the judgment was in accordance with and awarded only the relief agreed upon by the parties; that whatever claim said lienor might have it was not a permissable counter-claim. (Code Civ. Pro. § 501.) *Lipman* v. *J. A. Iron Works*. 58

2. Also *held*, that plaintiff's objection to the counter-claim was not waived by the omission to demur or specifically object thereto by answer; that the provisions of the Code of Civil Procedure providing for such a waiver (§§ 498, 499), relate only to defects in the complaint and a waiver by the defendant. *Id.*

3. *It seems* that where, upon foreclosure of a mortgage belonging to the estate of a decedent, the mortgaged premises are bought in by the personal representatives, they take on the character of the mortgage indebtedness, and so are as personalty in his hands, which he may dispose of, and for which he is liable to account as such; and this is so, although the decedent left a will which confers no power upon his executors to sell real estate. *Haberman* v. *Baker*. 253

FOREIGN CORPORATIONS.

1. No public policy forbids the transaction of business in this state by a corporation formed in another state by citizens of this state for the purpose of transacting business here, or requires the exclusion from recognition by the courts of this state of such a corporation. *Demarest* v. *Flack*. 205

2. The absence of terms imposed by the legislature as a condition of such a corporation doing business in this state, furnishes no ground for refusing to recognize it. *Id.*

3. The power rests with the legislature exclusively to say whether any, and, if so, what, terms shall be imposed upon such a corporation as a condition of its doing business here, and in the absence of any statute upon the subject and unless it appears that the corporation is formed to do acts prohibited by the laws of the state to its own citizens or corporations, if it is legally incorporated and entitled to recognition in the courts of the state where it was organized, it is entitled to recognition and protection in the tribunals of this state. *Id.*

FOREIGN JUDGMENT.

1. Judicial expositions by a court of another state of rules of the common law applicable to commercial transactions, do not bind the courts of this state. *St. Nicholas Bank* v. *State N. Bank*. 26

2. The decisions of the highest courts of a state as to the force and effect to be given to judgments of the courts of that state, may not be disregarded by the courts of another state, except for the gravest reasons and those demanded by the clearest rules of public policy and justice. *Teel* v. *Yost*. 387

3. A judgment by confession entered in another state upon a promissory note containing an authority to any attorney of the state to confess judgment for the sum agreed to be paid, if valid as a judgment *in personam* under the

laws of that state is equally valid here, and may be enforced by action in this state. *Id.*

4. The fact that such a judgment was entered before the maturity of the note, does not affect its validity here, in case it appears that the judgment was authorized by the laws of the state where it was rendered. *Id.*

5. The manner of entry of such a judgment is matter of form, to be regulated by the laws of the state where it was rendered. *Id.*

6. In an action upon a judgment by confession rendered by a court of general jurisdiction of Pennsylvania, it appeared that said judgment was entered by the prothonotary, the clerk of the court, upon an instrument known as a "judgment note," filed with the records of the court which, after a promise to pay a certain sum, authorized "any attorney of any court of record in Pennsylvania or elsewhere, to confess judgment therefor," and waived all stay of execution from and after the maturity of the note. Both parties to the note resided in Pennsylvania. It appeared that such notes were authorized by the laws of said state and that a prothonotary, as the clerk of the court, upon application of the owner of the note is required to enter judgment thereon against the person executing the same, without the agency of any attorney, and it was found that the judgment was duly rendered according to the law of Pennsylvania. *Held*, that the judgment was valid and conclusive against defendant here. *Id.*

FORMER ADJUDICATION.

1. Neither the verdict of a jury nor the findings of a court in a prior action upon the precise point involved in a subsequent action between the same parties constitute a bar, unless followed by a judgment based thereon, or into which the verdict or findings entered; the judgment is the bar, not the preliminary determination of the court or jury. *Springer* v. *Bien.* 99

2. So also, although a judgment has been entered in a prior action, it does not prevent the re-litigation of a fact litigated and found in such action, which was wholly irrelevant to the issues therein, and did not enter into and was not involved in the final judgment. *Id.*

3. In an action upon a contract, under which plaintiff claimed he was employed by defendants to procure orders for their work and was to receive as compensation a percentage of all the moneys realized from orders so procured, an accounting was asked for of all moneys received subsequent to a certain date on orders obtained by plaintiff prior to leaving defendants' employ, but upon which moneys were not realized until afterwards. Defendants did not specifically deny such contract, but set up as a bar a judgment in a former action brought by them against this plaintiff and others to restrain them from using in the business of a corporation organized by him and such others after he had left defendants' employ, a name, which they claimed to be their trade-mark, and to the use of which they were exclusively entitled. Upon the trial thereof evidence was given and a finding thereon made to the effect that the ten per cent commission was only to be paid on moneys received on orders placed by the plaintiff herein during his employment. A judgment was entered in favor of the plaintiffs in that action, among other things, enjoining the defendants therein from using said name and also requiring them to account to said plaintiffs for all property which they had obtained as the agent of said plaintiffs in the name of said company, and a referee was appointed to take and state the account. The defendants here claimed that the judgment in the prior action was a bar. *Held*, untenable; that even if the evidence in the prior action warranted a finding such as was claimed to have been made, such finding was wholly irrelevant to the issues and did not enter into and was not involved in the final judgment therein. *Id.*

4. Plaintiff, an attorney, upon the bequest of B., defendants' intestate, who had been adjudged a lunatic and for whom a committee had been appointed, instituted a proceeding to supersede the commission, and to have restored to him possession and control of his property. The court, after a full hearing, ordered a reference to inquire as to the continued insanity of the petitioner; the proceedings resulted in a determination that the lunacy still continued. After the death of B., plaintiff presented to the administrators a claim for his services, and upon rejection thereof brought this action to recover the same. During the lifetime of B., plaintiff instituted proceedings by petition for an allowance. The matter was referred and the report of the referee in plaintiff's favor was confirmed by the Special Term, and an order made directing B.'s committee to pay plaintiff out of the lunatic's estate the sum awarded. An appeal was taken to the General Term, which was argued before the death of B., but was not decided until afterwards. The General Term reversed the order appealed from and vacated the reference, but did not deny the original application; the order of reversal was entered as of a date anterior to B.'s death. *Held*, that the question as to plaintiff's right to compensation was not rendered *res adjudicata* by the decision of the General Term, as that decision may have proceeded on grounds entirely consistent with plaintiff's claim to some compensation. *Id.*

5. The agreement upon which this action was brought was that C., defendant's testator, would pay all the debts allowed or legally established against the estate of S., plaintiff's testator. *Held*, that the decree upon the judicial settlement of the accounts of S., to which accounting S. was made a party, was conclusive as to the amount of debts legally established. *Lawrence* v. *Church*. 324

6. By the agreement C. was to have the benefit of a mortgage belonging to the estate, or the proceeds, if any, after paying the legal and proper expenses and commissions in collecting the mortgage. A demurrer was interposed by the defendant to the complaint herein, which was sustained, with leave to plaintiffs to amend. Upon the accounting plaintiffs were allowed the expenses of their unsuccessful defense to the demurrer, and these were allowed them herein as expenses of administration. *Held*, error; that while such expenses were properly allowed to plaintiffs on their accounting, as between the parties here they could not be regarded as expenses of administration. *Id.*

7. But *held*, that with this exception the decree was conclusive evidence as to what the proper and legal expenses of administration were. *Id.*

8. The decree was entered subsequent to the commencement of this action, and it allowed as necessory expenses of administration disbursements made by plaintiffs after the action was commenced. *Held*, that in order to prove such items by the decree, application should have been made by plaintiffs under the provisions of the Code of Civil Procedure (§ 544), for leave to permit them to make a supplemental complaint, alleging the entry of the decree as a material fact which occurred since the former complaint was made. *Id.*

9. A party relying upon a former adjudication as a bar, must show that the point involved was decided in the former suit. *Unglish* v. *Marvin*. 380

FORMER SUIT PENDING.

The will of G. gave to his "grandchildren living in Michigan," at his decease, all his property in that state. A clause in a codicil stated that the testator was "in no wise pecuniarily indebted to any of his children," and declared null and void any testamentary gift to any one of them who should present a claim against the estate save for the bequest or devise given in the will. In an

action by one of the executors for the construction of the will, the complaint questioned the right of one of the grandchildren to be a legatee as to that portion of the estate in Michigan, and also the right of a child of the testator who had presented and had been allowed and paid a claim against the estate to a gift in the will to him. It appeared that at the time the action was brought, there was pending in the Surrogate's Court a proceeding instituted by plaintiff's co-executor for a judicial settlement of his accounts, in which were brought all the parties to the action, and that by objections filed therein the question as to the effect of the clause in the codicil was raised. The trial court dismissed the complaint. *Held*, no error; that the question as to the residence of the grandchild was one of fact proper to be disposed of by the surrogate and constituted no ground for invoking the jurisdiction of the court; that the question as to the construction of the codicil was within the jurisdiction of the Surrogate's Court, and that tribunal having first obtained jurisdiction, was entitled to retain and continue to exercise it. *Garlock* v. *Vandevort*. 374

FRAUD.

1. It is not a fraud as matter of law for the members of a firm to appropriate the firm property to the payment of a debt, for which they are all liable, although not a firm indebtedness, and one of the copartners who is jointly liable with the others, may appropriate his individual property for the payment of the joint debt. *Citizens' Bank* v. *Williams*. 77

2. Where, therefore, an attachment was obtained on the ground that the members of a firm had made an assignment with intent to defraud their creditors, and the only claim of fraud set forth in the moving papers was that the copartners gave their joint and several promissory notes for the individual debt of one of them, the other signing as surety, and that thereafter as a firm and as individuals they executed the assignment, in which they directed that the notes should be paid out of the proceeds of the firm property, *held*, that the denial of a motion to vacate the attachment upon the papers on which it was granted was error. *Id.*

—— *Fraud inducing the signing of a corporation agreement by a creditor, no defense in an action against him to recover for property purchased by him of a trustee appointed under the agreement.*

See Otis v. *Shants*. 45

FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

GENERAL TERM.

Where an action had been repeatedly tried, and upon the last trial was retried on the same evidence given on the previous trials, which was read from the former records, and there appeared no probability that the case could be changed in any material aspect on another trial, *held*, that the General Term, on reversal of a judgment in plaintiff's favor, had power to dismiss the complaint. *Brackett* v. *Griswold*. 644

See APPEALS.

GIFT.

While individuals who receive gifts of negotiable securities take them subject to all equities existing at the time between the original parties, they are not subject to such as may arise thereafter. *First N. Bank* v. *Wood*. 35

HABEAS CORPUS.

1. Where, in proceedings by habeas corpus, it appears that the person is held in custody under a commitment issued by a magistrate, the only inquiry is whether the magistrate had jurisdiction of the case and authority to pronounce the judgment rendered for the cause assigned. *People ex rel.* v. *P. E. House of Mercy*. 180

2. The decision of the magistrate may not be reviewed, and so, it is not essential to return the evidence on the trial. (Code Civ. Pro. §§ 2032, 2034.) *Id.*

3. If the process be valid on its face, the burden of impeaching its validity rests upon the prisoner. *Id.*

4. Under the provision of the Code of Civil Procedure in reference to proceedings on the filing of a traverse to a return to a writ of habeas corpus (§ 2039), the return is to be assumed to be true, except in so far as its material allegations are controverted by the traverse. *Id.*

5. The portion of such provision requiring the court or judge before whom the prisoner is brought to proceed in a summary way to hear the evidence, has no application unless the material allegations showing jurisdiction are controverted by a proper traverse. *Id.*

6. By the return to a writ of habeas corpus, it appeared that the prisoner was held by defendant, one of the institutions named in the act of 1886 (Chap. 353, Laws of 1886), amending the Consolidation Act for the city of New York, by virtue of a commitment issued by a police justice of that city. The commitment stated that the prisoner was a female under sixteen years of age; that she was brought before the magistrate by a policeman, who charged upon his oath that she was found in a reputed house of prostitution, and was in danger of becoming morally depraved; that she confessed and was convicted of the charge and committed to the guardianship of the institution. *Held*, that the commitment was in substance and form sufficient to show jurisdiction of the person of the prisoner and of the subject-matter of the complaint, as given by said act. *Id.*

7. The petitioner for the writ undertook to traverse the return by filing a verified statement in which she averred that the prisoner was her daughter, and previous to her arrest resided with petitioner; that neither the petitioner nor, as the petitioner is informed and believes, the prisoner was examined before the magistrate, nor was any evidence given to show that the house wherein the latter was found was a reputed house of prostitution, or that she was an inmate thereof and in danger of becoming morally depraved. *Held*, that the traverse failed to controvert any of the material facts stated in the return, or to avoid them by extrinsic matter; that while it would have been competent for the petitioner to have disputed the facts upon which the jurisdiction of the magistrate was predicated, or to have alleged extrinsic facts tending to show want of jurisdiction, in the absence of such allegations it was the duty of the judge to remand the prisoner. *Id.*

8. In proceedings by habeas corpus, it appeared that the relator was convicted of the crime of murder and sentenced to death; that he appealed to this court, where the judgment was affirmed; that after the appeal he was taken to state prison and there detained in close confinement. One ground upon which the prisoner's discharge was asked was that he had been once punished by imprisonment. *Held*, untenable; also that if the appeal operated to stay the continuance of the close confinement as well as the execution of the death penalty, then his subsequent imprisonment was unlawful, and the convict could not elect to submit to it and then treat it as a satisfaction of the sentence. *People* v. *Trezza*. 529

HIGHWAYS.

1 Owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil, are entitled to the benefit of the street in front of their premises for access and other purposes, and cannot be deprived thereof without compensation. *Reining* v. *N. Y., L. & W. R. Co.* 157

2. The right of such owners is not so absolute in its character that they can resist or prevent any and all interference with the street, to their detriment; nor can they as-

sert it to stay the municipality in the control, regulation or improvement of the streets in the public interests, although it may be made to appear that the privileges said owners had enjoyed and the benefits they had derived from the street would be curtailed or impaired, to their injury, by the changes proposed. *Id.*

3. As against abutting owners, having no title to the bed of a city street, it is competent for the legislature to authorize the construction of a horse or steam surface railroad therein, without making compensation to them for consequential damages, arising from a reasonable use of the street for purposes of such a railroad, not exclusive in its nature, and when the road is substantially on the same grade as the street itself and passage across and through the same is left free and unobstructed for the public use. *Id.*

4. Where, however, the street is practically and substantially closed against such owners for ordinary street uses, they are entitled to compensation. *Id.*

5. Where a charter of a city confers upon its common council power to permit the track of a railroad to be laid in, along or across any street or public ground, this must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded. *Id.*

6. *It seems* the primary object of the power to alter the grade of streets, conferred upon common councils in municipal charters, is to enable the municipal authorities to render a street more safe and convenient for public travel, to afford drainage and to adapt the street more perfectly for the purposes of a public way. *Id.*

7. A municipality cannot, under the guise of exercising such power, appropriate a part of a street practically to the exclusive use of a railroad company and cut off abutting owners, without compensation, from using any part of it in the accustomed way. *Id.*

8. The general improvement of those public highways of the state, its canals and its navigable rivers, is for the benefit of the public at large, although some locality or individual may be benefited more than others. *Waterloo W. M. Co.* v. *Shanahan.* 345

9. Where a highway is the dividing line between the lands of two adjoinining proprietors, each owning to the center, and one of them conveys, bounding the lands along or upon the highway, in the absence of an express reservation in the deed of his property in the highway, the deed conveys the fee to the center, subject to the public easement. *Haberman* v. *Baker.* 253

10. Where the grantor owns the fee of the soil of the whole highway, in the absence of facts raising a presumption of a contrary intent, the presumption is that the grantor intended to, and the conveyance will be deemed to, convey the fee of the whole highway. *Id.*

11. In either case, where by the abandonment of public easement the highway ceases to exist, the land comprising it reverts to the primary condition of ownership and of use, and becomes a parcel of the adjoining property, and the grantee is entitled to the possession of that portion conveyed by his deed. *Id.*

12. The construction of an elevated railroad in a city street, without having acquired the easements therein of an abutting owner, if it diminishes the rental value of his property, is an injury to the inheritance, and although the owner, after such construction, has leased his premises, he may maintain, and has the exclusive right to maintain an action for the damages sustained, *i. e.*, for the diminution in the rental value caused by the construction and operation of the railroad during the period in which the premises were in the actual occupation of tenants under the lease. *Kernochan* v. *N. Y. E. R. R. Co.* 559

13. Where, at the time of the construction of an elevated railroad

in a city street upon which plaintiff's premises abutted, said premises were in the possession of tenants occupying under a lease for a term of years, and about the time the railroad corporation began to operate the road plaintiff executed new leases, without having entered into possession, at rentals reduced because of the interference with his easements in the street, *held*, that he was entitled to recover the damages to the inheritance, *i. e.*, the diminution of the rental value. *Hine* v. *N. Y. E. R. R. Co.* 571

—— *The act of* 1889 *in relation to local improvement in town of Flatbush* (*Chap.* 161, *Laws of* 1889), *does not authorize construction of sewer in a highway in town of Flatlands without consent or acquisition of title of owners of soil; and this, although the highway may be considered as an urban street.*

See Van Brunt v. *Town of Flatbush.* 50

HUSBAND AND WIFE.

1. Where land is conveyed to husband and wife without any express restriction as to the character of their holding, they take as tenants by the entirety. *Stelz* v. *Shreck.* 263

2. As such tenancy is founded upon the marital relation and upon the legal theory that the husband and wife are one, it depends for its continuance upon the continuance of the relation, and when the unity is broken by a divorce the tenancy is severed; each takes a proportionate share of the property as a tenant in common. There is no implied condition annexed to an estate by the entirety that the grantees shall remain faithful to the marriage vow, or that either shall not by misconduct cause a severance of the marital relations, and a decree of divorce granted because of adultery does not vest the whole title in the innocent party. *Id.*

INFANTS.

By the return to a writ of habeas corpus, it appeared that the prisoner was held by defendant, one of the institutions named in the act of 1886 (Chap. 353, Laws of 1886), amending the Consolidation Act for the city of New York, by virtue of a commitment issued by a police justice of that city. The commitment stated that the prisoner was a female under sixteen years of age; that she was brought before the magistrate by a policeman, who charged upon his cath that she was found in a reputed house of prostitution, and was in danger of becoming morally depraved; that she confessed and was convicted of the charge and committed to the guardianship of the institution. *Held*, that the commitment was in substance and form sufficient to show jurisdiction of the person of the prisoner and of the subject-matter of the complaint, as given by said act. *People ex rel.* v. *P. E. House of Mercy.* 180

INJUNCTION.

1. A court having authority to grant a perpetual injunction to restrain continuous trespasses by a railroad corporation does not impair the exercise of its authority by permitting, and it may permit, the wrong-doer to escape its effect by voluntarily paying the owner a specified sum for the property injured. In an action brought in 1889 to obtain such an injunction it appeared that plaintiff obtained title to his premises prior to the year 1878, during which year defendant, without acquiring the easements or consents of the abutting owners, commenced and completed its road. The court found that plantiff saw the road from time to time while in process of construction and occasionally took passage upon it; that he had subscribed to a fund to pay counsel to prevent its erection, but prior to the commencement of this action made no protest and instituted no legal proceeding to prevent its construction or operation. It was also found that after this action was commenced defendant instituted proceedings to condemn said easements, which were pending at the time of the trial. The

court granted an injunction unless defendant pay to plaintiff a certain sum, as the depreciation of the value of the premises, upon his executing to it a conveyance of said easements. *Held*, no error. *Galway* v. *Met. E. R. Co.* 132

2. An unlawful use of property which renders the premises of a neighbor unfit for comfortable or respectable occupation and enjoyment is a private nuisance, against which the protection of a court of equity may be invoked although the use complained of also constitutes a public nuisance. *Cranford* v. *Tyrrell.* 341

3. In an action to restrain defendant, who was plaintiffs' adjoining neighbor in a city. from keeping a house of ill-fame and using his premises as an assignation house and to recover damages, the court found that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that persons occupying rooms in it acted in a boisterous and noisy manner and indecently exposed their persons at the window, "whereby the use and occupation of the plaintiffs' premises had been interfered with and rendered uncomfortable" and the occupants of their house "annoyed and seriously disturbed." The court granted the relief prayed for. *Held*, no error. *Id.*

4. In an action to restrain the operation of defendants' elevated railroad in a street in front of plaintiff's premises, and to recover damages, the court found that plaintiff obtained title to the property in 1883; that said railroad was built in 1880, and has been in operation ever since; that plaintiff paid the fair market value of the lot with the railroad in the street, and had sustained injuries by the construction and operation of the road from the time of her purchase to the time of trial; that defendants had the power of eminent domain and had authority to build the railway in the street but had not acquired plaintiff's easements therein. Judgment was rendered granting a permanent injunction, but providing that it should not issue in case defendants paid a sum fixed as the amount of permanent damage to the fee, upon the execution by plaintiff of a deed conveying to defendants, plaintiff's interest in the easements taken. *Held*, no error. *Pappenheim* v. *Met. E. R. Co.* 436

5. An equity court is not bound to issue an injunction when it will produce great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right. *Gray* v. *Man. R. Co.* 499

INSANE PERSON.

1. One who has been judicially determined to be a lunatic and for whom a committee has been appointed is incapable of entering into a contract, and any contract he assumes to make is absolutely void. *Carter* v. *Beckwith.* 312

2. The presumption of the continuance of the lunacy is conclusive as to all dealings with the lunatic after the inquisition and until it has been superseded. *Id.*

3. The court has power, on an application to supersede the commission, where reasonable grounds appear, to inquire whether the lunacy still continues, and even in a doubtful case to direct the inquiry; it may also, in its discretion, make the reasonable costs and expenses a charge upon the lunatic's estate, and this, although the traverse prove unsuccessful. *Id.*

4. *It seems*, that during the existence of the commission, the jurisdiction to award costs and expenses may only be invoked on petition or motion. *Id.*

5. As, however, upon the death of the lunatic the power of the committee *ipso facto* terminates and his real and personal property passes in the same manner as if he had been of sound mind and memory, the jurisdiction of the court to summarily administer his estate then ceases and all claims against the estate, including claims for such costs and expenses, must

be adjusted and settled in the ordinary course of administration. *Id.*

Plaintiff, an attorney, upon the request of B., defendant's intestate, who had been adjudged a lunatic and for whom a committee had been appointed, instituted a proceeding to supersede the commission, and to have restored to him possession and control of his property. The court, after a full hearing, ordered a reference to inquire as to the continued insanity of the petitioner; the proceedings resulted in a determination that the lunacy still continued. After the death of B., plaintiff presented to the administrators a claim for his services, and upon rejection thereof brought this action to recover the same. *Held*, that it appearing and having been found that plaintiff instituted the proceedings in good faith and that there was probable cause, the action was maintainable. *Id.*

7. During the life-time of B. plaintiff instituted proceedings by petition for an allowance. The matter was referred and the report of the referee in plaintiff's favor was confirmed by the Special Term, and an order made directing B.'s committee to pay plaintiff out of the lunatic's estate the sum awarded. An appeal was taken to the General Term, which was argued before the death of B., but was not decided until afterwards. The General Term reversed the order appealed from and vacated the reference, but did not deny the original application: the order of reversal was entered as of a date anterior to B.'s death. *Held*, that the question as to plaintiff's right to compensation was not rendered *res adjudicata* by the decision of the General Term, as that decision may have proceeded on grounds entirely consistent with plaintiff's claim to some compensation. *Id.*

INTEREST.

By the agreement upon which this action was brought, C., defendant's testator, agreed to pay to L., one of the plaintiffs, "$3,000, in such manner as will be acceptable to her." The referee allowed interest thereon from the date of the agreement. *Held*, error; that interest would not begin to run until a demand was made or a suit brought. *Lawrence* v. *Church*. 324

—— *Not allowable on unliquidated damages.*

See Blake v. *Krom*. 64

JOINT TENANTS.

See TENANTS IN COMMON AND JOINT TENANTS.

JUDGMENT.

1. After judgment has been rendered in an action, the fruits thereof are rights of property, and are beyond the reach of legislative power to affect. *Gilman* v. *Tucker*. 190

2. It is not essential to the validity of a sentence in a capital case that it shall state the mode in which the death penalty is to be inflicted; a statement that it shall be in the "mode by law prescribed and provided" is sufficient. *People* v. *Trezza*. 529

See CONFESSION OF JUDGMENT.
FORMER ADJUDICATION.
FOREIGN JUDGMENTS.
OFFER OF JUDGMENT.

JUDICIAL SALES.

The provision of the Code of Civil Procedure (§ 1440) relating to the title to real property sold on execution, as amended in 1881 (Chap. 681, Laws of 1881), which provides that if the title of the sheriff's "grantee or his assignees is adjudged for any reason or cause whatever to be null and void in any action for that purpose brought by the judgment debtor or his assignees, such judgment shall have no force or effect unless within twenty days after the entry" or in case of pending appeal, within twenty days after final judgment "the plaintiff shall pay

to such grantee or his assignees the * * * money * * * paid on the sale, with interest from the time of the sale, * * * including the costs and expenses of defendant in defending the action, * * * and in the event of the plaintiff's failure to pay such purchase-money and expenses within the time aforesaid, said title shall be valid in said grantee," is unconstitutional and void; it violates the constitutional prohibition against depriving the owner of his property without due process of law, and it assumes to nullify a final and unimpeachable judgment. It is also objectionable by reason of the ambiguity of the provision relating to the time limited for making the payments required by it. *Gilman* v. *Tucker*. 190

JURISDICTION.

1. By the return to a writ of habeas corpus, it appeared that the prisoner was held by defendant, one of the institutions named in the act of 1886 (Chap. 353, Laws of 1886), amending the Consolidation Act for the city of New York, by virtue of a commitment issued by a police justice of that city. The commitment stated that the prisoner was a female under sixteen years of age; that she was brought before the magistrate by a policeman, who charged upon his oath that she was found in a reputed house of prostitution, and was in danger of becoming morally depraved; that she confessed and was convicted of the charge and committed to the guardianship of the institution. *Held*, that the commitment was in substance and form sufficient to show jurisdiction of the person of the prisoner and of the subject-matter of the complaint, as given by said act. *People ex rel.* v. *P. E. House of Mercy*. 180

2. The provision of the act "in relation to the collection of taxes on lands of non-residents" (Chap. 427, Laws of 1855, as amended by chap. 448, Laws of 1885), declaring that after a certain time a deed of the comptroller, executed upon sale for the non-payment of taxes, shall be "conclusive evidence" that "the sale * * * and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of two years allowed by law to redeem, were regular and regularly given, published and served" does not cure jurisdictional defects. *Joslyn* v. *Rockwell*. 334

3. As to whether a statute making a tax deed, after a certain designated time, conclusive evidence of the existence of every fact necessary to create a good title under the deed, would be a valid exercise of legislative power, as against the original owner who had always been in possession and whose possession remained undisturbed up to the time of the bringing of an action to obtain possession under the tax deed, and where said owner had in fact either paid his taxes before sale, or a merely formal sale was made which was void for want of jurisdiction, *quære*. *Id*.

4. A surrogate, in a proceeding before him having for its object the settlement of an executor's accounts and the obtaining of a decree directing the distribution of the fund in his hands, when all the parties in interest are present, has authority to construe the provisions of the will and determine their meaning and validity, whenever necessary in order to make his decree as to distribution. *Garlock* v. *Vandevort*. 374

5. Such jurisdiction is incidental to the office and flows from the authority conferred upon the surrogate by the statute (Code Civ. Pro. § 2472), and is equal to and concurrent with the jurisdiction of the Supreme Court. *Id*.

6. The will of G. gave to his "grandchildren living in Michigan," at his decease, all his property in that state. A clause in a codicil stated that the testator was "in no wise pecuniarily indebted to any of his children," and declared null and void any testamentary gift to any one of them who should

present a claim against the estate save for the bequest or devise given in the will. In an action by one of the executors for the construction of the will, the complaint questioned the right of one of the grandchildren to be a legatee as to that portion of the estate in Michigan, and also the right of a child of the testator who had presented and had been allowed and paid a claim against the estate to a gift in the will to him. It appeared that at the time the action was brought, there was pending in the Surrogate's Court a proceeding instituted by plaintiff's co-executor for a judicial settlement of his accounts, in which were brought all the parties to the action, and that by objections filed therein the question as to the effect of the clause in the codicil was raised. The trial court dismissed the complaint. *Held*, no error; that the question as to the residence of the grandchild was one of fact proper to be disposed of by the surrogate and constituted no ground for invoking the jurisdiction of the court; that the question as to the construction of the codicil was within the jurisdiction of the Surrogate's Court, and that tribunal having first obtained jurisdiction, was entitled to retain and continue to exercise it. *Id.*

7. Upon an application for the voluntary dissolution of a corporation, under the provisions of the Code of Civil Procedure (§§ 2419 *et seq.*) the court acquires jurisdiction upon a petition properly presented; by its appointment of a receiver the property of the corporation comes into its possession, and it has power to preserve and protect it; for this purpose it may prohibit any interference therewith in any action thereafter instituted. *In re Christian Jensen Co.* 550

8. In an action to recover the possession of personal property, defendant gave an undertaking for the return of the property, which contained a recital admitting that plaintiffs had taken the property described in his affidavit and requisition from defendant's possession. Upon the trial, defendant offered to prove that he did not have in his possession, when demand was made upon him, more than one-quarter of the property mentioned in plaintiff's affidavit, which offer was rejected, upon the ground that the admission was conclusive. Thereafter defendant, with the consent of his sureties, moved at Special Term for leave to substitute a new undertaking without the admission, in place of the original. The motion was denied upon the ground that as the court had held the admission conclusive, the court had no power to grant it. *Held*, error; that it was conclusive only until set aside, and as to whether or not this should be permitted, rested in the discretion of the Supreme Court. *Dale* v. *Gilbert.* 625

9. Where an action had been repeatedly tried, and upon the last trial was retried on the same evidence given on the previous trials, which was read from the former records, and there appeared no probability that the case could be changed in any material aspect on another trial, *held*, that the General Term, on reversal of a judgment in plaintiff's favor, had power to dismiss the complaint. *Brackett* v. *Griswold.* 644

JUSTICE OF THE PEACE.

1. Where, in the course of proceedings before a justice of the peace, which he was forced to entertain and in which he had jurisdiction of the subject-matter and acquired jurisdiction of the person of one charged with an offense, a question is presented as to whether, on account of certain steps taken, the justice has authority to proceed further, which question is dependent upon the construction of a statute, and he, in good faith, erroneously decides that he has authority to and does proceed, the error is simply one of judgment upon a question of law, and the justice is not responsible therefor in a civil action. *Austin* v. *Vrooman.* 229

2. In an action for false imprisonment, it appeared that the defendant V. appeared before the de-

fendant C., a justice of the peace, and made a sworn complaint against the plaintiff, charging him with supplying diluted milk to a butter factory in violation of the act of 1885 (Chap. 183, Laws of 1885), which makes such an act a misdemeanor. C. issued a warrant. Plaintiff was arrested, and on being arraigned pleaded not guilty; he waived a preliminary examination and offered bail for his appearance before the next grand jury. The district attorney, who appeared for the people, claimed that the justice had exclusive jurisdiction. The offer was overruled, and plaintiff thereupon demanded a jury, which was summoned; he was tried, found guilty on the trial, sentenced to pay a fine, and to be imprisoned until it was paid, not to exceed ninety days; and thereupon he was taken to and confined in the county jail until his discharge was procured. The conviction was affirmed by the Court of Sessions of that county, but was reversed by the General Term. *Held*, that while C. erred in trying plaintiff after his offer of bail, he did not render himself liable in damages, and that the complaint was properly dismissed *Id.*

3. The distinction between such a case and one where the justice proceeds without jurisdiction of the subject-matter and the person, pointed out. *Id.*

LACHES.

1. In an action to recover the balance of an indebtedness for services rendered, in which the defense was payment, it appeared that one W. gave his check to defendant for the amount of a loan. Defendant, on the same day, indorsed and delivered it to plaintiff at the place where the bank on which it was drawn was located, to apply upon the indebtedness in suit. W. requested plaintiff to hold the check for a few days, stating if plaintiff would let him know when he wished to use the check, he would then provide for it. W. testified on the trial that he had then enough money to pay the check and would have paid it had payment been insisted upon. Plaintiff kept the check for nine days before he presented it for payment. W. in the meantime had become insolvent. The cashier of the bank on which it was drawn testified that there were no funds to meet it, and it would not have been paid if it had been presented any time after the day of its date. There was no agreement that the check in suit should be taken in absolute satisfaction of the debt. The court directed a verdict for the plaintiff. *Held*, error; that the delay in presenting the check discharged defendant from liability as indorser; that the delay was not excused by the fact that the drawer had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment; that while the indorsement and transfer of the check operated as a provisional payment only, if the delay caused a loss to defendant, to the extent of the loss the delay was tantamount to actual payment; that as there was evidence tending to show that the delay prevented a collection of the check in whole or in part, and that so much was lost to defendant, the case should have been submitted to the jury. *Carroll* v. *Sweet*. 19

2. No lapse of time or inaction merely on the part of an owner of real property after the erection and during the maintenance of an unlawful structure thereon by another, unless it has continued for such a period of time as will effect a change of title in the property or authorize the presumption of a grant, is sufficient to defeat the right of the owner to his action at law or equity. *Galway* v. *Met. E. R. Co.* 132

3. Where a legal right is involved, and upon grounds of equity jurisdiction the courts have been called upon to sustain the legal right, the mere *laches* of a party, unaccompanied by circumstances amounting to an estoppel, constitute no defense. *Id.*

LANDLORD AND TENANT.

1. The parties entered into a verbal contract by which plaintiff agreed

to occupy a portion of defendant's farm for a period of five years, each to do certain work and furnish certain things specified, the receipts of sales of the products of the land to be equally divided. Plaintiff took possession of the premises and occupied for over two years, when he was dispossessed. In an action to recover damages for breach of the agreement, *held*, that it was void, as it was not to be performed within a year; that the occupancy under it did not create a tenancy from year to year, and the relation of landlord and tenant in any form was not created either by the agreement or in consequence of any occupancy under it; and so, that plaintiff was not entitled to recover. *Unglish* v. *Marvin*. 380

2. The construction of an elevated railroad in a city street, without having acquired the easements therein of an abutting owner, if it diminishes the rental value of his property, is an injury to the inheritance, and although the owner, after such construction, has leased his premises, he may maintain, and has the exclusive right to maintain, an action for the damages sustained, *i. e.*, for the diminution in the rental value caused by the construction and operation of the railroad during the period in which the premises were in the actual occupation of tenants under the lease. *Kernochan* v. *N. Y. E. R. R. Co.* 559

3. Upon the death of such lessor, intestate, or having devised the land, the right to damages accruing after his death goes with the title to his heirs or devisee, not to his personal representatives. *Id.*

4. *It seems* that where a lease was executed prior to the construction of the road, the lessee is the party entitled to maintain the action. *Id.*

5. Where, at the time of the construction of an elevated railroad in a city street upon which plaintiff's premises abutted, said premises were in the possession of tenants occupying under a lease for a term of years, and about the time the railroad corporation began to operate the road plaintiff executed new leases, without having entered into possession, at rentals reduced because of the interference with his easements in the street, *held*, that he was entitled to recover the damages to the inheritance, *i. e.*, the diminution of the rental value. *Hine* v. *N. Y. E. R. R. Co.* 571

LAW OF PLACE.

See CONFLICT OF LAWS.

LIEN.

A lien on property, personal or real, given as security for a debt, is not impaired by the fact that the remedy at law for the recovery of the debt is barred by the Statute of Limitations. *Hulbert* v. *Clark*. 295

See MECHANIC'S LIEN.
MORTGAGE.

LIMITATION OF ACTIONS.

1. Trespasses upon real property effected by an unlawful structure or nuisance are continuous in their nature and give separate successive causes of action from time to time as the injuries are perpetrated, barred only by the running of the statute against the successive trespasses. *Galway* v. *Met. E. R. Co.* 132

2. While, therefore, the lapse of six years after the erection of such a structure bars not only the legal, but is a practical defense to an equitable action, based upon the original trespass, if the structure is continued new causes of action arise, unbarred by any rule of law or equity and cognizable not only at law but in equity until the statute has run as against each. *Id.*

3. Accordingly *held*, that the right to bring an action to restrain an elevated railroad company which had constructed its road in a street in front of plaintiff's premises and

thereby unlawfully interfered with plaintiff's easements in the street, was not barred by the lapse of ten years from the time the road was constructed. (Code Civ. Pro. § 388.) *Id.*

4. "Mary E." the wife of T. died in 1845 seized of certain premises in the city of New York, the title to which vested in her upon the death of E., her mother. The title descended upon the death of "Mary E." to her five infant children, subject to the life estate of her husband, as tenant by the curtesy; he married again, his second wife having the same baptismal name and middle initial as the first, *i. e.*, "Mary E." In 1853 T. and his wife joined in a warranty deed of the premises, her name being given therein as "Mary E." T. represented to the grantees that his wife named in the deed was the sole surviving child of E. and that the property belonged to her, and in the deed the devolution of title was recited. The grantees purchased in good faith, paying a consideration, which was the full value of the premises. The grantees took possession, built upon and thereafter transferred the property, neither they nor their successors in interest having any knowledge of the fraud or the defect in their title until after the death of T. who died in 1882. In an action of ejectment thereafter brought by the children of the first wife, *held*, that the grantees of T. acquired under their deed only his life estate; that the title of the children was unaffected by the fraud committed by him, and the deed was no obstacle to a recovery by them of their inheritance on the termination of the life estate; also that their right of action did not arise until after the death of their father, and so that the Statute of Limitations was not a bar to the action. *Thompson* v. *Simpson*. 270

5. The Statute of Limitations is merely a statutory bar to a recovery, and acts only upon the remedy; it does not after the prescribed period destroy, discharge or pay a debt or produce a presumption of payment, but simply stands in the way of the creditor seeking to compel payment. *Hulbert* v. *Clark*. 295

6. A lien on property, personal or real, given as security for a debt, is not impaired by the fact that the remedy at law for the recovery of the debt is barred by the statute. *Id.*

7. *It seems* the legislature may repeal the statute, and that a debt upon which the right of action was barred by it at the time of the repeal may thereafter be enforced by action without invading the constitutional rights of the debtor. *Id.*

8. An action for the foreclosure of a mortgage given to secure the payment of certain promissory notes was brought within twenty years of the date of the mortgage but more than six years after the notes fell due. There was no covenant in the mortgage to pay the notes. *Held*, that the action was not barred by the Statute of Limitations; that the mortgage continued to be a subsisting lien, and could be foreclosed after an action at law upon the notes was barred by the statute. *Id.*

9. Under the provisions of the act providing "for the assessment and collection of taxes in the city of Albany" (§ 52, chap. 86, Laws of 1850), which, in case a purchaser at a tax sale shall be unable to recover possession of the real estate because of error or irregularity in the proceedings for the levying or collection, requires the board of supervisors of the county to reimburse the purchase-money, and upon the refusal or neglect to do so, authorizes the recovery of the money in an action against the board, when, in consequence of some defect in the proceeding, a sale is invalid, and because thereof the purchaser is unable to recover possession, he is at once entitled to reimbursement and his cause of action is barred, if suit is not brought in six years from the time when the right to make a demand for reimbursement was complete. (Code Civ. Pro. § 410.) *Reid* v. *Bd. Supvrs.* 364

10. In an action under said provision to recover back the purchase-money paid on various tax sales, all of which were made in and prior to 1883, and more than seven years before the commencement of the action, it was not alleged in the complaint or shown upon the trial that any legal proceeding had been instituted by the purchaser or his successor in interest to recover possession of the land, or that he made any effort to obtain possession, but it was admitted that by a decision of this court (*Remsen* v. *Wheeler*, 105 N. Y. 573), rendered four years after the sale in an action between other parties, sales under similar proceedings in another locality were adjudged illegal and void. The court below decided that neither the purchaser nor plaintiff, his successor in interest, was entitled to bring an action for reimbursement until such decision, and so that the action was not barred by the statute. *Held*, error; that the decision had no effect upon and in no way changed the rights, duties or obligations of the parties here, but was simply an authority as to the law. *Id.*

11. *It seems*, also, that the purchaser must act within a reasonable time after he obtains his certificate; that in case he institutes legal proceedings and conducts them to a determination with reasonable diligence, the statute will begin to run from such termination; and that if he relies upon a demand of possession, and this is shown to have been made within a reasonable time, the statute will begin to run from that time. *Id.*

12. *It seems*, also, the amendment of said provision made by the act of 1889 (Chap. 429, Laws of 1889), which requires the reimbursement to be made "within six years from such sale," is prospective in its character, and so has no effect upon prior sales; that said amendment did not repeal the limitations of the Code of Civil Procedure, but left them to apply to the past and simply made a new rule for future cases. *Id.*

LUNATICS.

See INSANE PERSONS.

MALICIOUS PROSECUTION.

In an action for malicious prosecution plaintiff's evidence showed these facts: Under a contract between defendant and the Brooklyn park commissioners for a supply of water to Prospect park, defendant's water-pipes were connected with certain mains belonging to the city, and under the control of the commissioners. By the contract the commissioners were authorized to terminate it and disconnect the pipes in case of failure of defendant to furnish water as agreed, on giving six months' previous notice. The commissioners caused a written notice to be served on defendant that they had annulled the contract because the defendant "had not performed the conditions" thereof, and were about to cut the connections. The next day, by written order given to plaintiff, who was in the employ of the commissioners, he was directed to disconnect the pipes; while engaged executing the order defendant protested and threatened to imprison him if he continued the work. He, however, completed it, doing the work in a proper manner and so as not unnecessarily to injure defendant's pipes. Defendant, who knew that plaintiff acted under the order of the commissioners, thereupon presented a verified complaint to a magistrate, under the Penal Code (§ 639), charging that plaintiff "did commit a misdemeanor by maliciously and willfully cutting the water-main;" it did not disclose the relation of plaintiff to the commissioners or the circumstances under which he acted. Plaintiff was thereupon arrested and brought before a magistrate. Upon the proceeding being adjourned defendant insisted that plaintiff should be "locked up." The proceeding was terminated by plaintiff's discharge. *Held*, that the evidence authorized the submission of the questions of probable cause and malice to the jury; that when defendant applied for the warrant he was chargeable with knowledge that in obeying the direction of the park commissioners, plaintiff did not "maliciously and willfully" disconnect

the pipes as charged. *Wass* v. *Stephens.* 123

MANDAMUS.

1. By the charter of the village of Wellsburg (Chap. 291, Laws of 1870, as amended by chap. 68, Laws of 1887, and chap. 172, Laws of 1888), every person elected or appointed to office is required to take and file with the clerk of the village an oath of office. By an ordinance of the board of trustees authority was conferred upon said clerk to administer such oath. A majority of the inspectors of election signed a statement as to the results of an annual election for village officers, which was filed with the clerk; this showed that there were one hundred and thirty-six ballots cast for president, of which sixty-six were cast for the relator, "Morris A. Young," one for "Morris Young," one for "M. A. Young," one was defective, and one blank. Defendant, the village clerk, when applied to for that purpose, refused to administer the oath of office to the relator, claiming that he was not legally elected. *Held*, that a mandamus was properly granted, requiring defendant to perform this duty; that he was not called upon to decide as to the legality of the applicant's election; but, in his ministerial capacity, was obliged to administer the oath, if *prima facie* it appeared, as it did in this case, that the individual desiring to be sworn had the greatest number of votes, at least if he was not known to be ineligible; also, that a certificate from the inspectors as to the relator's election was not requisite. *People ex rel.* v. *Straight.* 545

2. As to whether the clerk might refuse to administer and file such oath, if the applicant was known to be ineligible, *quære.* *Id.*

3. Upon the granting of a peremptory writ of mandamus, with costs, an application for a stay pending appeal having been denied, defendant complied with the writ, paid the costs and appealed to the General Term, where the appeal was dismissed, the court holding that it was not a practical question, the terms of the writ having been complied with. *Held*, error; that the case should have been heard on the merits, as defendant would be entitled to a restoration of the costs paid, in case the order were reversed. *In re Martin* v. *W. J. J. Co.* 605

MANUFACTURING CORPORATIONS.

—— *As to rights of stockholders of a corporation organized for the purpose of renting an apartment-house, under the amendment of the Manufacturing Act of* 1881 (*Chap.* 589, *Laws of* 1881). *See Compton* v. *The Chelsea.* 537

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *It seems*, that an employe, without experience in a particular work required of him, in which danger to him exists, from causes not apparent, but known to his employer, is entitled to have such information communicated to him as will apprize him of the nature of the work and of the possible risks in its execution. *Gates* v. *State.* 221

2. A railroad company is bound to guard its employes against negligence of co-employes, so far as it can, by the enactment and promulgation of reasonable rules in the management of its business, and the rule that the employe takes the risk of the business is subject to the qualification that the company perform this, as well as other duties, to protect the employe from unnecessary hazards while engaged in his work. *Abel* v. *Prest., etc., D. & H. C. Co.* 662

MECHANIC'S LIEN.

In an action for the foreclosure of a mortgage it appeared that $55,000, the amount to secure which the mortgage was given, was by its terms to be advanced to the mort-

gagors in seventeen specific installments, dependent upon different stages of the work of constructing a building upon the mortgaged premises, which was to be the chief security for the loan. When the advances amounted to about $40,000 a lien for materials furnished and services performed was filed. The mortgagees thereupon declined to make any further advances, and a contract was then entered into by which the lienor agreed to subordinate its lien to the further advances called for by the mortgage, and the mortgagees agreed to pay said lien in specified proportions out of the fifteenth and sixteenth installments when they should be earned and become due, and they accepted an order upon them payable out of said installments when due. The mortgagors never earned or became entitled to these installments, but the mortgagees advanced to them the amount secured by the mortgage, and $10,000 more, less the amount of the lienor's claim, to be used in the prosecution of the work, under an agreement with said lienor that the claim should be paid out of said $10,000. The lienor was made defendant, but no personal judgment asked against it; it set up its claim as a counter-claim and asked for a money judgment. The counter-claim was dismissed. *Held*, no error; that whatever claim said lienor might have it was not a permissible counter-claim. (Code Civ. Pro. § 501.) *Lipman* v. *J. A. Iron Works.* 58

MISDEMEANOR.

The word "willfully" in the provision of the Penal Code (§ 639), declaring that "any person who willfully or maliciously displaces, removes, injures or destroys * * * a pipe or main for conducting water or gas * * * is punishable by imprisonment," means not simply a voluntary and intentional act, which is in fact wrongful, but one done with a wrongful purpose, with a design to injure another, or from mere wantonness or lawlessness. *Wass* v. *Stephens.* 123

MORTGAGE.

An action for the foreclosure of a mortgage given to secure the payment of certain promissory notes was brought within twenty years of the date of the mortgage but more than six years after the notes fell due. There was no covenant in the mortgage to pay the notes. *Held*, that the action was not barred by the Statute of Limitations; that the mortgage continued to be a subsisting lien, and could be foreclosed after an action at law upon the notes was barred by the statute. *Hulbert* v. *Clark.* 295

See CHATTEL MORTGAGE.
FORECLOSURE.

MOTIONS AND ORDERS.

1. While *it seems*, a proceeding on the part of a client, or his assignee, to compel his attorney to pay over money received by him for the client, may be entertained, and the court may direct payment of the money or punish the attorney by fine or imprisonment, this is not a matter of absolute legal right, but simply one of discretion, and an order refusing to grant the relief sought, which does not show that it was made because of want of jurisdiction, is not reviewable here. *Schell* v. *Mayor, etc.* 67

2. An order denying a motion for a new trial, made in a criminal case, after final affirmance of a judgment of conviction, upon the ground of newly-discovered evidence, is not reviewable here, either upon appeal or certiorari. *People* v. *Trezza.* 529

3. Such an order is only reviewable in connection with, and upon appeal from the judgment, and when it is embodied in the judgment-roll. (Code Crim. Pro. §§ 485, 517.) *Id.*

4. Even if an order granted upon a petition for the voluntary dissolution of a corporation is in some respects irregular, imperfect and informal, it is not, because of this, a nullity. *In re Christian Jensen Co.* 550

5. An application for such an order, prayed for a dissolution of the corporation; the order granted thereon was entitled "In the Matter of the Application of the Directors" of the corporation for a voluntary dissolution. The order recited that the corporation was insolvent, and required all persons interested to show cause why the prayer of the petitioner should not be granted. *Held*, that this was substantially a requirement to show cause "why the corporation should not be dissolved," and so was sufficient in this particular. *Id.*

6. The order did not direct its publication and did not specify the newspapers in which it was to be published, as required. (Code Civ. Pro. § 2424.) *Held*, that while this was a defect, it was not one which rendered the appointment of the receiver a nullity; also, that the court having jurisdiction of the proceedings had authority to make an order *nunc pro tunc*, correcting the defect. *Id.*

7. A motion for judgment of affirmance or to dismiss an appeal, based on the ground that only the same questions arise therein which have been passed upon by this court in other cases lately decided, will not be granted where this is denied by the appellant. *Clark* v. *Claflin*. 610

MUNICIPAL CORPORATIONS.

1. Owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil, are entitled to the benefit of the street in front of their premises for access and other purposes, and cannot be deprived thereof without compensation. *Reining* v. *N. Y., L. & W. R. Co.* 157

2. The right of such owners is not so absolute in its character that they can resist or prevent any and all interference with the street, to their detriment; nor can they assert it to stay the municipality in the control, regulation or improvement of the streets in the public interest, although it may be made to appear that the privileges said owners had enjoyed and the benefits they had derived from the street would be curtailed or impaired, to their injury, by the changes proposed. *Id.*

3. Where a charter of a city confers upon its common council power to permit the track of a railroad to be laid in, along or across any street or public ground this must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded. *Id.*

4. *It seems* the primary object of the power to alter the grade of streets, conferred upon common councils in municipal charters, is to enable the municipal authorities to render a street more safe and convenient for public travel, to afford drainage and to adapt the street more perfectly for the purposes of a public way. *Id.*

5. A municipality cannot, under the guise of exercising such power, appropriate a part of a street practically to the exclusive use of a railroad company and cut off abutting owners, without compensation, from using any part of it in the accustomed way. *Id.*

See ALBANY (CITY OF).
BUFFALO (CITY OF).
NEW YORK (CITY OF).
WELLSBURG (VILLAGE OF).

NEGLIGENCE.

1. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, the testimony was to this effect: Plaintiff was riding in one of defendant's street cars; a wagon loaded with lumber was moving in the opposite direction, using the rails of another track. The driver of the wagon, after it had passed the driver of the street car and when it was abreast of the car, suddenly turned off the track; the lumber which projected beyond the wagon was, by the movement, thrust through a window of the car, and struck the plaintiff, in-

flicting the injury complained of. The car driver happening to look up in his mirror saw the wagon driver in the act of turning out, and he at once set the brake and stopped the car. It was claimed that the car was traveling at an unusual rate of speed. *Held*, that the evidence failed to show any negligence on the part of defendant, and the submission of the question to the jury was error; that assuming the rate of speed of the car was unusual, it had nothing to do with the accident. *Alexander* v. *R. C. & B. R. R. Co.* 13

2. In an action to recover damages for injuries to plaintiffs' goods, caused by steam which escaped from certain apparatus, which defendant, a corporation engaged in furnishing steam for the purposes of heat and motive power, had put into the premises occupied by plaintiffs, under a contract with them, it appeared that after the apparatus had been tested in the usual manner and found to be apparently safe and adequate, the premises were closed from Saturday night until Tuesday morning; that shortly after they were opened the bonnet on the service valve in one of the pipes in the basement was blown off and the steam escaped, doing the injuries complained of. It was proved that no similar accident had happened in defendant's business, that defendant used the best material, purchased of manufacturers of high repute, and employed competent and skilled workmen, and there was no evidence of any visible defect or that the work was not well done. *Held*, that the refusal to nonsuit was error; that the burden was upon the plaintiffs to show that defendant failed to use the degree of care which ordinary prudence and foresight would, under the circumstances, suggest; that the mere fact that the bonnet blew out did not furnish sufficient evidence of negligence. *Reiss* v. *N. Y. Steam Co.* 103

3. *It seems* that an employe, without experience in a particular work required of him, in which danger to him exists, from causes not apparent, but known to his employer, is entitled to have such information communicated to him as will apprize him of the nature of the work and of the possible risks in its execution. *Gates* v. *State.* 221

4. In an action to recover damages for injuries received by plaintiff while getting on one of defendant's street cars, it appeared that plaintiff was a man twenty-six years old, able-bodied and unincumbered; he waited for one of defendant's open cars upon a crosswalk and motioned for it to stop; when it had nearly stopped he put his foot on the step on the side of and near the middle of the car and took hold of the stanchion, and after the car had moved six or seven feet, he was struck by the wheel of a truck which was standing in the street. *Held*, that a refusal to nonsuit was error; that it was plaintiff's duty to see, before getting on the car, that there was no obstacle outside the car which would make it dangerous for him to attempt to get on board; and that if the injury was attributable to any negligence, it was, in part at least, that of plaintiff. *Moylan* v. *Second Ave. R. R. Co.* 583.

5. In an action against the owners of a truck, to recover damages for alleged negligence, the evidence tended to show these facts: The driver was driving very rapidly along a street, upon one side of which there was no sidewalk and this side was bounded by a wall near which some children were playing, among them the plaintiff. The children were in plain view of the driver; the truck moved along without turning, about three feet from the wall; plaintiff was struck by one of the horses and injured. *Held*, that the evidence sufficiently showed negligence on the part of the driver to require the submission of the question to the jury. *Barrett* v. *Smith.* 607

6. A railroad company is bound to guard its employes against negligence of co-employes, so far as it can, by the enactment and promulgation of reasonable rules in the management of its business, and the rule that the employe takes

the risk of the business is subject to the qualification that the company perform this, as well as other duties, to protect the employe from unnecessary hazards while engaged in his work. *Abel* v. *Prest., etc., D. & H. C. Co.* 662

7. Upon the trial of an action to recover damages for alleged negligence causing the death of plaintiff's testator, a repairman in defendant's employ, who was killed while at work under a car, the negligence charged was the omission to promulgate proper rules for the protection of car repairers. The rules of other companies upon this subject were given in evidence, and the court charged in substance that the jury were to weigh the evidence and, in view of the rules adopted by different companies, determine whether defendant had discharged its duties, but that they were not to find a rule proper or improper because some other company had adopted or rejected it. *Held*, no error. *Id.*

NEW YORK (CITY OF).

1. Plaintiff, having passed a civil service examination, received, on April 25, 1881, a written certificate of his appointment by the aqueduct commissioners of the city of New York, three of whom certified to his qualifications, as inspector of masonry upon the new aqueduct. Said certificate neither stated plaintiff's term of office, nor the salary to be paid; the salary was fixed at $120 per month. He was from time to time suspended, without charges being made against him or reasons assigned; while so suspended, he received no salary. During one of the periods of suspension, plaintiff entered into an agreement with the city that, while suspended, his pay should cease. This action was brought to recover salary for the periods of suspension. *Held*, that plaintiff was entitled to recover for those periods prior to the agreement but not for subsequent ones; that the office of inspector being one created by the act under which the said commissioners were acting (Chap. 490, Laws of 1883), the incumbent was not a simple employe or laborer, but an officer, and his compensation, when fixed, accompanied the office until he was removed or consented to a new rate of compensation; that while the term of office was at the pleasure of the commissioners, they could not effect arbitrarily, temporary or indefinite suspension without pay; but that it was competent for them to enter into an agreement with plaintiff in relation thereto, and the agreement made constituted a waiver of his right to the salary thereafter during suspension. *Emmitt* v. *Mayor, etc.* 117

2. By the return to a writ of habeas corpus, it appeared that the prisoner was held by defendant, one of the institutions named in the act of 1886 (Chap. 353, Laws of 1886), amending the Consolidation Act for the city of New York, by virtue of a commitment issued by a police justice of that city. The commitment stated that the prisoner was a female under sixteen years of age; that she was brought before the magistrate by a policeman, who charged upon his oath that she was found in a reputed house of prostitution, and was in danger of becoming morally depraved; that she confessed and was convicted of the charge and committed to the guardianship of the institution. *Held*, that the commitment was in substance and form sufficient to show jurisdiction of the person of the prisoner and of the subject-matter of the complaint, as given by said act. *People ex rel.* v. *P. E. House of Mercy.* 180

3. The petitioner for the writ undertook to traverse the return by filing a verified statement in which she averred that the prisoner was her daughter, and previous to her arrest resided with petitioner; that neither the petitioner nor, as the petitioner is informed and believes, the prisoner was examined before the magistrate, nor was any evidence given to show that the house wherein the latter was found was a reputed house of prostitution, or that she was an inmate thereof and

in danger of becoming morally depraved. *Held*, that the traverse failed to controvert any of the material facts stated in the return, or to avoid them by extrinsic matter; that while it would have been competent for the petitioner to have disputed the facts upon which the jurisdiction of the magistrate was predicated, or to have alleged extrinsic facts tending to show want of jurisdiction, in the absence of such allegations it was the duty of the judge to remand the prisoner. *Id.*

—— *As to trespasses upon rights of abutting owners by the erection of elevated railroads on streets in city.*

See Galway v. *Met. E. R. Co.* 132
Pappenheim v. *Met. E. R. Co.* 436
Roberts v. *N. Y. E. R. R. Co.* 455
Gray v. *Manhattan R. Co.* 499
Kernochan v. *N. Y. E. R. R. Co.* 559
Hine v. *N. Y. E. R. R. Co.* 571

NUISANCE.

1. *It seems* the mere fact that a business is being carried on, which may be shown to be immoral and, therefore, prejudicial to the neighborhood, furnishes of itself no ground for equitable interference at the suit of a private person. Although the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. *Cranford* v. *Tyrrell.* 341

2. *It seems* also, that only the public authorities, acting in the common interest, can interfere for the suppression of a common nuisance. *Id.*

3. The fact, however, that the perpetrator of a nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person who has sustained special damage, to recover the same and to restrain a continuance of the nuisance. *Id.*

4. An unlawful use of property which renders the premises of a neighbor unfit for comfortable or respectable occupation and enjoyment is a private nuisance, against which the protection of a court of equity may be invoked, although the use complained of also constitutes a public nuisance. *Id.*

5. In an action to restrain defendant, who was plaintiffs' adjoining neighbor in a city, from keeping a house of ill-fame and using his premises as an assignation house and to recover damages, the court found that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that persons occupying rooms in it acted in a boisterous and noisy manner and indecently exposed their persons at the window "whereby the use and occupation of the plaintiffs' premises had been interfered with and rendered uncomfortable" and the occupants of their house "annoyed and seriously disturbed." The court granted the relief prayed for. *Held*, no error. *Id*

OFFER OF JUDGMENT.

1. In the provision of the Code of Civil Procedure (§ 738), authorizing an offer of judgment by a defendant and providing that if plaintiff does not serve notice of acceptance and "fails to obtain a more favorable judgment, he cannot recover costs from the *time of the offer*, but must pay costs from that time," the words "time of the offer" mean "date of the offer;" it speaks as of the date when it was made. *Lynk* v. *Weaver.* 171

2. Defendant offered judgment for a certain amount, "with costs to date;" the offer was not accepted. Plaintiff recovered judgment for less than the amount offered, but was allowed costs on the ground that the offer was a nullity and did not protect defendant against costs subsequent to the offer, because of the addition of the words "to date," as plaintiff, in case of acceptance, would have been obliged to incur the fees for entry of judgment. *Held*, error; that the costs of judgment were a portion of the costs "to date," and

that those words were mere surplusage. *Id.*

——*Where a defendant appeals to County Court from judgment of Justices' Court and demands a new trial, it seems the only way the plaintiff can secure costs in case of a recovery of less than fifty dollars, is by making an offer of judgment; if defendant refuses to accept he is liable for costs unless the recovery is more favorable than the offer.*

See McKuskie v. *Hendrickson.* 555

OFFICE AND OFFICER.

Plaintiff, having passed a civil service examination, received, on April 25, 1881, a written certificate of his appointment by the aqueduct commissioners of the city of New York, three of whom certified to his qualifications, as inspector of masonry upon the new aqueduct. Said certificate neither stated plaintiff's term of office, nor the salary to be paid; the salary was fixed at $120 per month. He was from time to time suspended, without charges being made against him or reasons assigned; while so suspended, he received no salary. During one of the periods of suspension, plaintiff entered into an agreement with the city that, while suspended, his pay should cease. This action was brought to recover salary for the periods of suspension. *Held*, that plaintiff was entitled to recover for those periods prior to the agreement, but not for subsequent ones; that the office of inspector being one created by the act under which the said commissioners were acting (Chap. 490, Laws of 1883), the incumbent was not a simple employe or laborer, but an officer, and his compensation, when fixed, accompanied the office until he was removed or consented to a new rate of compensation; that while the term of office was at the pleasure of the commissioners, they could not effect arbitrarily, temporary or indefinite suspension without pay; but that it was competent for them to enter into an agreement with plaintiff in relation thereto, and the agreement made constituted a waiver of his right to the salary thereafter during suspension. *Emmitt* v. *Mayor, etc.* 117

——*When extra allowance of costs not proper, on dismissal of complaint in action to try title to office in a religious corporation.*

See People ex rel. v. *Adams.* 129

See ELECTION (OF OFFICERS)

PARTIES.

Under a liquidation agreement between a corporation and its creditors, plaintiffs were appointed trustees. In an action upon certain promissory notes given for property purchased by defendant of the trustees after they had assumed the trust, the answer alleged that defendant, as creditor, was induced to become a party to the liquidation agreement by false representations, and asked to have the same set aside and canceled as to him. *Held*, that a demurrer to the answer was properly sustained; that the proper parties were not represented in the litigation to entitle defendant to judgment upon the issue sought to be made by his answer. *Otis* v. *Shants.* 45

PARTNERSHIP.

1. Where two firms, with one or more members, have mutual dealings, one of the firms may give its notes for an amount found due from it on settlement of the account to the other or to individual members thereof; and *it seems*, actions at law may be maintained upon said notes without an accounting as between the members of the firm giving the notes. *First N. Bank* v. *Wood.* 35

2. In 1876, upon settlement of accounts between the firm of O. K. W. & Co., which was composed of three members, and the firm of V. A. W. & Co., composed of two members, who were also members of the former firm, a sum was found due the latter firm from the former. In settlement thereof it was agreed that O. K. W. & Co. should give its notes to each of the

members of V. A. W. & Co. for one-half of the amount. At their request the note to which each was entitled was made payable to his wife. Each received his note and delivered it to his wife as a gift, and it was thereafter retained by her. O. K. W. & Co. paid interest on said notes each year up to 1884, by giving to the holders its notes therefor; in May of that year it became insolvent and made an assignment for the benefit of creditors, preferring the wives to the amount of the original notes and those given for interest. In an action by a judgment creditor of O. K. W. & Co., a portion of whose claim accrued in 1879, to set aside said assignment as fraudulent because of said preferences, *held*, that the action was not maintainable; that the payees named in the notes became absolute owners upon delivery to them, to the same extent as if they had paid value; and that such title and consequent right of recovery were in no way diminished or affected by the subseqent dealings or complications of the two firms. *Id.*

3. It is not a fraud as matter of law for the members of a firm to appropriate the firm property to the payment of a debt, for which they are all liable, although not a firm indebtedness, and, one of the copartners who is jointly liable with the others, may appropriate his individual property for the payment of the joint debt. *Citizens' Bank* v. *Williams.* 77

4. Where, therefore, an attachment was obtained on the ground that the members of a firm had made an assignment with intent to defraud their creditors, and the only claim of fraud set forth in the moving papers was that the copartners gave their joint and several promissory notes for the individual debt of one of them, the other signing as surety, and that thereafter as a firm, and as individuals they executed the assignment, in which they directed that the notes should be paid out of the proceeds of the firm property, *held*, that the denial of a motion to vacate the attachment upon the papers on which it was granted was error. *Id.*

5. As to whether if the firm assets were in the hands of a court of equity to be administered according to equitable principles, the court would direct the firm debts to be first paid, *quære*. *Id.*

PAYMENT.

1. The Statute of Limitations is merely a statutory bar to a recovery, and acts only upon the remedy; it does not after the prescribed period destroy, discharge or pay a debt or produce a presumption of payment, but simply stands in the way of the creditor seeking to compel payment. *Hulbert* v. *Clark.* 295

2. In an action to recover an over payment alleged to have been made to defendants upon a contract for the purchase of railroad ties, it appeared that plaintiff agreed to take at certain prices for different woods, all ties defendants could get during the season, "ties to be counted and paid for before put in the river." Defendants were not paid more than they were entitled to for ties actually delivered and accepted, reckoning them at the prices fixed by the contract. The referee found that the word "counted," as used in the contract, meant inspected. Plaintiff claimed that, as on inspection part of the ties delivered were classified by plaintiff's inspectors as seconds, and were in fact seconds, he was not bound to pay therefor the price for first-class ties. *Held*, untenable; that the finding that the word "counted" means "inspected," might authorize the rejection of all but first-class ties, but did not in the absence of a provision in the contract to that effect, justify the conclusion that both firsts and seconds might be accepted and only the actual value of the seconds paid for them. *Larrowe* v. *Lewis.* 593

PENAL CODE.

§ 451, subd. 3. *People* v. *Most.* 108
§ 639. *Wass* v. *Stephens.* 123

PENALTIES.

1. By the amendment in 1889 (Chap. 236, Laws of 1889), of the act of 1874 (Chap. 430, Laws of 1874), providing for "the reorganization of railroads sold under a mortgage," a reorganized railroad corporation no longer incurs the risk of a forfeiture of its charter by a failure to build an extension to its road so as to complete it in accordance with the original plan, after the board of railroad commissioners makes and files a certificate that, in their opinion, the public interests do not require such extension, and the effect of the amendment is to abolish the penalty which the original act imposed, and as there is no clause in the amendatory act saving pending prosecutions, all actions pending at the time of its going into effect, in which judgment had not been rendered, were left subject to the rule created by the amendment, and the certificate is a bar to the action. *People* v. *U. & D. R. R. Co.* 240

2. In an action to recover a penalty for an alleged violation of the provision of the statute in relation to fishing with nets in the fresh waters of this state (§ 23, chap. 534, Laws of 1879, as amended by chap. 127, Laws of 1884, which prohibits the catching or killing of any fish, with certain exceptions, among which are "suckers," in any way except by angling with a hook and line, in any of the fresh waters of the state, except certain places named, among which W. creek was not included, it was claimed that defendant had caught suckers with a net in W. creek, and had thereby rendered himself liable to the penalty prescribed by the statute; that the court should strike out the word suckers from the exceptions in the prohibitory clause, as in no other way could effect be given to certain other clauses in the form of exceptions contained in the statute, which provide that, in waters specified, it shall be lawful for certain persons to possess and fish for suckers with a seine or spear during certain months. *Held*, untenable; that the purpose of the clauses referred to was simply to limit and restrict, in the places named, the license to catch suckers given by the general exception. *People* v. *Tanner*. 416

3. The complaint also demanded the penalty imposed by said statute (§ 23) upon one having a net in his possession on the shores of waters inhabited by black or Oswego bass. The only proof introduced by plaintiff to show that the creek was inhabited by said bass, was that of a witness, who testified that he had once caught them therein, above the dam, which is near a river inhabited by them, and into which the creek empties. Defendant proved by several witnesses, who had fished in W. creek for many years, that they had never caught any of said bass in the creek, or seen any that had been caught there. The question was submitted to the jury and they found in favor of defendant. *Held*, no error. *Id.*

PLEADINGS.

1. Under a liquidation agreement between a corporation and its creditors, plaintiffs were appointed trustees. In an action upon certain promissory notes given for property purchased by defendant of the trustees after they had assumed the trust, the answer alleged that defendant, as creditor, was induced to become a party to the liquidation agreement by false representations, and asked to have the same set aside and canceled as to him. *Held*, that a demurrer to the answer was properly sustained; that the proper parties were not represented in the litigation to entitle defendant to judgment upon the issue sought to be made by his answer; and that it set up no defense, as fraud inducing the execution of the contract was no answer to defendant's obligation to pay for property purchased of the trustees. *Otis* v. *Shants*. 45

2. The answer also set up as counterclaims, claims arising on certain transactions between the corporation, its officers and agents, and defendant prior to the liquidation agreement. *Held*, that as the

alleged claims were not against plaintiffs and had no connection with the cause of action set forth in the complaint, they were not proper matters of counter-claim; and that a demurrer was properly sustained. *Id.*

3. Defendant did not ask any affirmative relief upon his counter-claims, but as to each, asked to be permitted to set off sufficient thereof to satisfy plaintiffs' claims; the demurrers thereto were upon the ground "that they were insufficient in law upon the face thereof." *Held*, that the demurrers were sufficiently specific. (Code Civ. Pro. § 494.) *Id.*

4. The provisions of the Code of Civil Procedure (§§ 495, 496), requiring that where a demurrer to a counter-claim is on the ground that the cause of action sought to be counter-claimed did not arise out of the contract or transaction set forth in the complaint, or was not connected with the subject of the action, or that the counter-claim does not set forth a cause of action, these objections must be distinctly specified in the demurrer, only apply where defendant demands affirmative relief. *Id.*

5. In an action for the foreclosure of a mortgage it appeared that $55,000, the amount to secure which the mortgage was given, was by its terms to be advanced to the mortgagors in seventeen specific installments, dependent upon different stages of the work of constructing a building upon the mortgaged premises, which was to be the chief security for the loan. When the advances amounted to about $40,000 a lien for materials furnished and services performed was filed. The mortgagees thereupon declined to make any further advances, and a contract was then entered into by which the lienor agreed to subordinate its lien to the further advances called for by the mortgage, and the mortgagees agreed to pay said lien in specified proportions out of the fifteenth and sixteenth installments when they should be earned and become due, and they accepted an order upon them payable out of said installments when due. The mortgagors never earned or became entitled to these installments, but the mortgagees advanced to them the amount secured by the mortgage, and $10,000 more, less the amount of the lienor's claim, to be used in the prosecution of the work, under an agreement with said lienor that the claim should be paid out of said $10,000. The lienor was made defendant, but no personal judgment asked against it; it set up its claim as a counter-claim and asked for a money judgment. The counter-claim was dismissed. A judgment of foreclosure and sale was ordered for the amount of the mortgage and interest, and the surplus ordered to be brought into court. *Held*, no error; that the judgment was in accordance with and awarded only the relief agreed upon by the parties; that whatever claim said lienor might have it was not a permissible counter-claim. (Code Civ. Pro. § 501.) *Lipman* v. *J. A. Iron Works.* 58

6. Also *held*, that plaintiff's objection to the counter-claim was not waived by the omission to demur or specifically object thereto by answer; that the provisions of the Code of Civil Procedure providing for such a waiver (§§ 498, 499), relate only to defects in the complaint and a waiver by the defendant. *Id.*

7. In an action to recover damages for injuries received by plaintiff while using a toboggan upon a slide on premises in the posession and management of defendants, the complaint alleged that defendants were a joint stock company doing business in New York city under a name given, and that the injuries arose from the negligence of their employes. The answer denied these allegations. Upon the trial, plaintiff gave no evidence as to defendants being a joint stock company, but endeavored to prove a joint or partnership liability based upon allegations that the premises were leased to them for the purpose of putting up the toboggan slides. Defendants claimed that they were simply individual members of and stock-

holders in an incorporated company, which hired the grounds and operated the slides. They offered in evidence a certificate of incorporation of such company under the laws of West Virginia and also the Code of said state. These were objected to on the ground that the existence or incorporation of such company should have been pleaded. The objections were overruled. *Held*, no error; that the defense was not one necessary to be pleaded, but was admissible under the general denial in the answer. *Demarest* v. *Flack*. 205

8. In an action to recover the purchase-price of certain goods, the answer was a general denial. The evidence upon the trial showed conclusively the sale, delivery and acceptance of the goods. Defendants sought to show that after delivery defendants complained of the quality of the goods, and it was thereupon agreed that they should be considered as having received them as consignees to sell for and on account of plaintiffs; this was excluded. *Held*, no error; that it was an affirmative defense which might not be proved under a general denial. *Wallace* v. *Blake*. 676

POWER OF ATTORNEY.

It is not necessary that a power of attorney to confess judgment should be acknowledged or attested by a subscribing witness. *Teel* v. *Yost*. 387

PRACTICE.

—— *Where a defendant appeals to County Court from judgment of Justice's Court and demands a new trial, it seems the only way the plaintiff can secure costs, in case of a recovery of less than fifty dollars, is by making an offer of judgment; if defendant refuses to accept, he is liable for costs, unless the recovery is more favorable than the offer.*

See McKuskie v. *Hendrickson*. 555

—— *As to practice in Board of Claims on the sending down of a remittitur modifying an award.*

See Sayre v. *State* (Mem.). 622

—— *Where party claims to have been misled by entry in clerk's minutes on trial, and in consequence failed to produce proof, his proper remedy is not by appeal, but by motion to have case opened and be let in to make further proofs.*

See Quinlan v. *Stratton* (Mem.). 659

See APPEAL.
PLEADINGS.
TRIAL.

PRINCIPAL AND AGENT.

1. A bank receiving commercial paper for collection is, in this state, in the absence of a special agreement, liable for a loss occasioned by the default of its correspondents or other agents selected by it to make the collection. *St. Nicholas Bank* v. *State N. Bank*. 26

2. Where the sub-agent makes the collection, but fails to pay over the proceeds and is insolvent, the insolvency does not shield the collecting agent from liability for the loss. *Id.*

PRINCIPAL AND SURETY.

The rule which restricts the liability of sureties to the strict terms of their contract and forbids an extension thereof by inference or implication, does not apply to a case where the instrument shows a clear intention, on the part of the sureties, to come under a more enlarged obligation. *McElroy* v. *Mumford*. 303

PROFESSIONAL COMMUNICATIONS.

1. The provision of the Code of Civil Procedure (§ 835) prohibiting on attorney from disclosing professional communications made to him by his client does not apply, as between the parties, to communications made by two or more persons in consultation with an attorney for their mutual benefit; it cannot be invoked in any litigation which may thereafter arise between such persons, although

it seems it may in a litigation between them and a stranger. *Hurlburt* v. *Hurlburt*. 420

2. Where testimony of the attorney as to communications so made would have been competent in an action between such persons, it is also competent in an action between their personal representatives as such; and this, although the parties to the latter action are personally interested. *Id.*

PROPERTY.

After judgment has been rendered in an action, the fruits thereof are rights of property, and are beyond the reach of legislative power to affect. *Gilman* v. *Tucker*. 190

PUBLIC POLICY.

No public policy forbids the transaction of business in this state by a corporation formed in another state by citizens of this state for the purpose of transacting business here, or requires the exclusion from recognition by the courts of this state of such a corporation. *Demarest* v. *Flack*. 205

QUESTIONS OF LAW AND FACT.

—— *When question of negligence one of law.*

See Alexander v. *R. C. & B. R. R. Co.* 13
Reiss v. *N. Y. Steam Co.* 103
Moylan v. *S. A. R. R. Co.* 583

—— *When question of negligence one of fact.*

See Barrett v. *Smith*. 607

RAILROAD CORPORATIONS.

1. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, the testimony was to this effect: Plaintiff was riding in one of defendant's street cars; a wagon loaded with lumber was moving in the opposite direction, using the rails of another track. The driver of the wagon, after it had passed the driver of the street car and when it was abreast of the car, suddenly turned off the track; the lumber which projected beyond the wagon was, by the movement, thrust through a window of the car, and struck the plaintiff, inflicting the injury complained of. The car driver, happening to look up in his mirror, saw the wagon driver in the act of turning out, and he at once set the brake and stopped the car. It was claimed that the car was traveling at an unusual rate of speed. *Held*, that the evidence failed to show any negligence on the part of defendant, and the submission of the question to the jury was error; that, assuming the rate of speed of the car was unusual, it had nothing to do with the accident. *Alexander* v. *R. C. & B. R. R. Co.* 13

2. Upon an appeal from an order of Special Term confirming an award of commissioners appointed to appraise lands taken by a railroad company, the General Term reversed the order of Special Term and ordered a new appraisal before the same commissioners. *Held*, that the order, being one in a special proceeding and not final, was not appealable to this court. (Code Civ. Pro. § 190, subd. 3.) *In re S. B. R. R. Co.* 93

3. It appeared that the land taken was part of a highway known as the "southern boulevard," laid out under the act of 1867 (Chap. 290, Laws of 1867), which provides (§ 24) that no rails shall be laid in said boulevard except for the purpose of crossing it, and that if the legislature thereafter authorize the building of a railroad along it, nothing in said act shall be construed to affect or cut off the rights of the owners of the lands taken for the boulevard from claiming and receiving the full value of the lands taken for the road, to the same extent as if no boulevard had been laid out. The petitioner claimed that the provision as to damages was repealed by the amendment of said act in 1887 (Chap. 723, Laws of 1887). A merely nominal award was ren-

dered to the land owners by the commissioners appointed to appraise damages; the General Term reversed the order confirming said award upon the ground that the legislature could not take away the rights reserved to the property owners under the act of 1867, without compensation. *Held*, that the order appealed from did not come within the provision of the Code of Civil Procedure (§ 190, subd. 2), making, in certain contingencies, an order adjudging a statutory provision of the state unconstitutional, appealable to this court; that said provision relates only to orders in an action affecting a substantial right, and not resting in discretion. *Id.*

4. The right to bring an action to restrain an elevated railroad company which had constructed its road in a street in front of plaintiff's premises and thereby unlawfully interfered with plaintiff's easements in the street, is not barred by the lapse of ten years from the time the road was constructed. (Code Civ. Pro. § 388.) *Galway* v. *Met. E. R. R. Co.* 132

5. A court having authority to grant a perpetual injunction to restrain such continuous trespasses, does not impair the exercise of its authority by permitting, and it may permit, the wrong-doer to escape its effect by voluntarily paying the owner a specified sum for the property injured. *Id.*

6. In such an action brought in 1889 it appeared that plaintiff obtained title to his premises prior to the year 1878, during which year defendant, without acquiring the easements or consents of the abutting owners, commenced and completed its road. The court found that plaintiff saw the road from time to time while in process of construction and occasionally took passage upon it; that he had subscribed to a fund to pay counsel to prevent its erection, but prior to the commencement of this action made no protest and instituted no legal proceeding to prevent its construction or operation. It was also found that after this action was commenced defendant instituted proceedings to condemn said easements, which were pending at the time of the trial. The court granted an injunction unless defendant pay to plaintiff a certain sum, as the depreciation of the value of the premises, upon his executing to it a conveyance of said easements. *Held*, no error. *Id.*

7. Prior to 1875 plaintiffs owned certain premises on W. street in the city of Buffalo, their title extending to the centre of the street, subject to the public easement. In that year said city acquired by condemnation the title to a large number of its streets, including W. street, a uniform and nominal award of damages being paid to each of the owners, including plaintiffs. The city charter confers upon its common council power to alter the grade of streets and to "permit the track of a railroad to be laid in, along or across any street or public ground." (Laws 1870, chap. 519, tit. 9, §§ 1, 2, 6; tit. 3, § 19.) In 1882 said common council granted to defendant, a steam railroad corporation, the right to construct and maintain two tracks along the centre of W. street. In pursuance thereof and in accordance with the map and profile approved by said council and under the direction of the city engineer, defendant built an embankment in W. street in front of plaintiffs' premises, supported laterally by perpendicular stone walls, which practically excluded all abutting owners from that part of the street thus occupied, and so interfered with the use of the street as to cause the rental value of plaintiffs' premises to depreciate. *Held*, that an action was maintainable to recover damages for such depreciation. *Reining* v. *N. Y., L. & W. R. Co.* 157

8. Also *held*, that the action of the common council in authorizing the construction of the embankment was not a change of grade within the meaning of the charter, and, therefore, the provision of the charter that "when the city shall alter the recorded grade of any street or alley, the owner of any house or lot fronting thereon may,

within one year thereafter, claim damages by reason of such alteration" (Tit. 9, § 17), did not apply so as to confine the plaintiffs to a remedy against the city. *Id.*

9. Also *held*, that while the authority conferred by the General Railroad Act (Chap. 140, Laws of 1850, § 24) upon railroad corporations to cross highways in the construction of their lines, authorizes their construction on, over or below the highway grade, and so, to make such incidental changes of the grade as may be rendered necessary, without giving a right of action to abutting owners who sustain injury, the change here made did not come within that authority. *Id.*

10. By the amendment in 1889 (Chap. 236, Laws of 1889), of the act of 1874 (Chap. 430, Laws of 1874), providing for "the reorganization of railroads sold under a mortgage," a reorganized railroad corporation no longer incurs the risk of a forfeiture of its charter by a failure to build an extension to its road so as to complete it in accordance with the original plan, after the board of railroad commissioners makes and files a certificate that, in their opinion, the public interests do not require such extension. *People* v. *U. & D. R. R. Co.* 240

11. The effect of the amendment is to abolish the penalty which the original act imposed, and as there is no clause in the amendatory act saving pending prosecutions, all actions pending at the time of its going into effect, in which judgment had not been rendered, were left subject to the rule created by the amendment, and the certificate is a bar to the action. *Id.*

12. In an action brought by the attorney-general, under the Code of Civil Procedure, an extra allowance was granted. It was conceded that the only matters involved in the action was the existence of the defendant's corporate franchise, and that the extra allowance must be predicated upon the value of the franchise. The evidence showed that the corporation paid no dividends and no interest on its debt, and that its gross earnings for the previous year were insufficient to pay its operating expenses. The state, however, had imposed a tax upon "the corporate franchise and business" of the company under the act of 1881 (Chap. 361, Laws of 1881). *Held*, that the allowance was erroneous; that the tax imposed furnished no evidence of the actual value of the franchise. *Id.*

13. Upon an application to appoint commissioners to appraise private property sought to be acquired by a corporation organized under the act of 1888 (Chap. 462, Laws of 1888), which authorizes the formation of elevated tramway corporations for the transportation of freight and the condemning of private lands for the corporate purposes, these facts appeared: The petitioner's articles of association state that it was formed for the purpose of constructing, maintaining and operating an elevated tramway between two points specified, "a distance of about four miles." The map originally filed, and the only one filed, did not include the lands in question. The tramway had been built and was in operation for a distance of about three and one-half miles. One of the termini was upon the lands of a manufacturing corporation, the other upon the lands of the petitioner, near the manufactory of said corporation. The incorporators of the petitioner were stockholders, interested in said corporation, and the petitioner was organized and thus far has been operated exclusively as an instrumentality to facilitate the business of the corporation. The lands sought to be acquired were to increase the petitioner's terminal facilities at the northern terminus of its road. There is no public highway leading to this terminus. All that was claimed by the petitioner was that the surplus of the capacity of the road, after supplying the wants of said manufacturing corporation, was to be let to some one individual engaged in selling coal, to be used in transporting that article. As to whether there would be any such surplus or whether it could be availed of by the public, did not

appear. It also appeared that the petitioner had lands which could be used for the purpose for which the land in question was desired, but not as conveniently. *Held*, that the use for which the land was sought to be acquired was not public, but private, and that the petitioner's application was properly denied. *In re S. R. Cable R. Co.* 408

14. *It seems* that in condemnation proceedings by an elevated railroad corporation to acquire the rights of an abutting owner in a street upon which the corporation has constructed its road without the consent of such owner, the measure of compensation would be the difference between the fair market value of the whole property at the time of condemnation, without the unlawful structure, and the present market value of the property left with the structure in existence, and this is the measure of the permanent damages, the payment of which on receipt of a conveyance, may, in an action to restrain the wrong-doer, be made a condition for the denial of an injunction. *Pappenheim* v. *Met. E. R. Co.* 436

15. The right of a vendee who has purchased of the abutting owner, to restrain future trespasses cannot be defeated because of the fact that the vendor sold, without having brought any action in equity before his conveyance, and although he sold at a loss, because of the acts of the wrong-doer. The vendor's right to bring such an action, or to receive the amount of the depreciation, ceases to exist upon the transfer of the property; he retains his right to recover the temporary damages sustained while he was owner, but the right to restrain the continuance of the trespass, and with it the right to permanent damages, passes to the vendee. *Id.*

16. In an action to restrain the operation of defendants' elevated railroad in a street in front of plaintiff's premises, and to recover damages, the court found that plaintiff obtained title to the property in 1883; that said railroad was built in 1880, and has been in operation ever since; that plaintiff paid the fair market value of the lot with the railroad in the street, and had sustained injuries by the construction and operation of the road from the time of her purchase to the time of trial; that defendants had the power of eminent domain and had authority to build the railway in the street but had not acquired plaintiff's easement therein. Judgment was rendered granting a permanent injunction, but providing that it should not issue in case defendants paid a sum fixed as the amount of permanent damage to the fee, upon the execution by plaintiff of a deed conveying to defendants, plaintiff's interest in the easements taken. *Held*, no error. *Id.*

17. Where, in an action by an abutting owner to restrain the operation and maintenance of an elevated railroad in a street, the question as to the fee value of the property rights of which plaintiff is deprived by the unlawful structure is gone into for the purpose of determining the amount to be paid by defendant for a conveyance of those rights, the defendant is entitled to claim that the investigation shall be made upon competent and legal evidence, and if improper evidence is admitted, to its damage, it has the right to ask the appellate court for relief; it is no answer that defendant is not bound to avail itself of the privilege granted of paying the amount of damages found for a conveyance of the easements, but may submit to an injunction. *Roberts* v. *N. Y. E. R. R. Co.* 455

18. As to whether the defendant has the right to refuse to pay and to submit to the injunction, *quære*. *Id.*

19. In such an action the opinion of an expert as to what would have been the value of plaintiff's property had defendants' road not been built and operated is incompetent testimony. (RUGER, Ch. J., and GRAY, J., dissenting.) *Id.*

20. In an action by an abutting owner to restrain the operation of

an elevated railroad in a city street, the opinion of an expert as to what plaintiff's premises would have been worth without the road is not competent evidence. *Doyle* v. *Manhattan R. Co.* 488

21. *It seems* it is competent for such witnesses to give opinions as to the present and past value of property, based upon facts they have observed, but it is improper to permit them to speculate as to the facts and then base a speculative opinion thereon. *Id.*

22. In such an action it is competent for either party to show the general effect of the operation of the road upon other premises abutting upon the street, in the vicinity of, and similarly situated with plaintiff's, where it appears that damages claimed by plaintiff, if actually sustained, must have been common in the vicinity along the street. *Id.*

23. But *it seems* that while the court may not confine the examination to the premises in question and exclude all proof offered as to the general effect upon other premises, it may, in the exercise of its discretion, confine the examination to premises in the vicinity, giving a reasonable range, and may limit the number of witnesses. *Id.*

24. It is competent also to prove, where plaintiff's premises are fitted and occupied in part for business purposes, the effect of the operation of the road upon the business and traffic in the streets. *Id.*

25. *It seems* that in such case the witnesses should be confined mainly to giving observed facts, and that they should not be permitted to give mere speculative opinions. *Id.*

26. In an action by an abutting owner to restrain defendant from the maintenance and operation of its elevated road in a street, a witness was asked and permitted to answer, under objection and exception, as to what, in his opinion, was the best use to which the plaintiff's property "could have been put if it had not been for the elevated railroad and this interference." *Held*, error. *Gray* v. *Manhattan R. Co.* 499

27. The judgment of the trial court granted an injunction unless defendants paid a sum fixed as the damages to the fee, upon receiving a conveyance from plaintiff of the easements taken, in which case it was denied. It was claimed here that the whole judgment should not have been reversed because of error in admitting improper evidence bearing upon the question as to the damages to the fee, but that the portion which awarded the injunction should be permitted to stand. *Held*, untenable; that the question as to the granting of the injunction was dependent upon the amount of damages, as unless the court had found them to be substantial, it could, in the exercise of its discretion, have withheld the injunction and left plaintiff to his remedy at law; also that it was discretionary with the court either to reverse in whole or in part. *Id.*

28. A railroad corporation duly organized under and in pursuance of the "Rapid Transit Act" (Chap. 606, Laws of 1875), acquires by the act of incorporation, and upon obtaining the necessary consents of the public authorities and the property owners, an indefeasible right to construct its road upon the route or routes designated in its articles of incorporation; the lands necessary for the purpose are by the sovereign power appropriated to that exclusive use, and a lien is impressed upon them in favor of the corporation, which ripens into title through purchase or condemnation proceedings; the subsequent condemnation of the lands in the course of the railroad construction is merely incidental, in order to compensate property holders. *Suburban R. T. Co.* v. *Mayor, etc.* 510

29. The distinction between such a corporation and one organized under the General Railroad Act pointed out. *Id.*

30. Prior to the passage of the act of 1884 (Chap. 522, Laws of 1884),

providing for the laying out of new parks in the city of New York, plaintiff had been organized under the "Rapid Transit Act;" one of its routes, as located by the articles of association and to which the necessary consents of the public authorities and property holders had been obtained, ran through private grounds. These were included in one of the parks designated in said act; subsequent to its passage, plaintiff, by condemnation proceedings, acquired the right to the strip of land over which the route was located. The commissioners of estimate, appointed under the act of 1884, made an award to plaintiff, as the value of the strip, which it refused to receive. The city authorities, claiming to have acquired the fee, took possession of the strip and prevented plaintiff from proceeding with its work of construction thereon. In an action to determine the rights of the parties, *held*, that plaintiff, by and upon its organization, became possessed of the absolute and exclusive franchise to construct, operate and maintain its road over the strip in question, which operated to vest in it a legal right to have said strip; that said franchise was not impaired by the fact that the work of actual construction had not been commenced or the land condemned before the passage of the act of 1884, and plaintiff was not divested thereof by the proceedings under said act; that it was inoperative to take away or to authorize a deprivation or curtailment of such right; that it was not necessarily to be inferred from the language of the act that it was the legislative intent to destroy the prior public use included in plaintiff's franchise, but rather that the two uses should stand together; and that the appropriation for a public park was intended to be subject to the exercise by the plaintiff of its franchise. *Id.*

31. The construction of an elevated railroad in a city street, without having acquired the easements therein of an abutting owner, if it diminishes the rental value of his property, is an injury to the inheritance, and although the owner, after such construction, has leased his premises, he may maintain, and has the exclusive right to maintain, an action for the damages sustained, *i. e.*, for the diminution in the rental value caused by the construction and operatiou of the railroad during the period in which the premises were in the actual occupation of tenants under the lease. *Kernochan* v. *N. Y. E. R. R. Co.* 559

32. Upon the death of such lessor, intestate, or having devised the land, the right to damages accruing after his death goes with the title to his heirs or devisee, not to his personal representatives. *Id.*

33. *It seems* that where a lease was executed prior to the construction of the road the lessee is the party entitled to maintain the action. *Id.*

34. Where, upon the trial of an action by an abutting owner to recover such damages, a question calling for the opinion of an expert witness called by plaintiff as to what would have been the value of the premises if the road had not been constructed, a general objection of incompetency was interposed, which was overruled, *held*, no error; that the objection did not raise the point that the opinion of the witness was inadmissible; that it was aimed not at the mode of proof, but rather at the competency of the fact sought to be proved. *Id.*

35. Where, at the time of the construction of an elevated railroad in a city street upon which plaintiff's premises abutted, said premises were in the possession of tenants occupying under a lease for a term of years, and about the time the railroad corporation began to operate the road plaintiff executed new leases, without having entered into possession, at rentals reduced because of the interference with his easements in the street, *held*, that he was entitled to recover the damages to the inheritance, *i. e.*, the diminution of the rental value. *Hine* v. *N. Y. E. R. R. Co.* 571

36. In an action to recover damages for injuries received by plaintiff while getting on one of defend-

ant's street cars, it appeared that plaintiff was a man twenty-six years old, able-bodied and unincumbered; he waited for one of defendant's open cars upon a crosswalk and motioned for it to stop; when it had nearly stopped he put his foot on the step on the side and near the middle of the car and took hold of the stanchion, and after the car had moved six or seven feet, he was struck by the wheel of a truck which was standing in the street. *Held*, that a refusal to nonsuit was error; that it was plaintiff's duty to see, before getting on the car, that there was no obstacle outside the car which would make it dangerous for him to attempt to get on board; and that if the injury was attributable to any negligence, it was, in part at least, that of plaintiff. *Moylan* v. *Second Ave. R. R. Co.* 583

37. A decision of the General Term of the Supreme Court, rendered upon report of commissioners appointed to appraise lands in proceedings to acquire title thereto under the Rapid Transit Act (Chap. 606, Laws of 1875) is not reviewable in this court. *In re Met. E. R. Co.* 600

38. A railroad company is bound to guard its employes against negligence of co-employes, so far as it can, by the enactment and promulgation of reasonable rules in the management of its business, and the rule that the employe takes the risk of the business is subject to the qualification that the company perform this, as well as other duties, to protect the employe from unnecessary hazards while engaged in his work. *Abel* v. *Prest., etc., D. & H. C. Co.* 662

39. Upon the trial of an action to recover damages for alleged negligence causing the death of plaintiff's testator, a repairman in defendant's employ, who was killed while at work under a car, the negligence charged was the omission to promulgate proper rules for the protection of car repairers. The rules of other companies upon this subject were given in evidence, and the court charged in substance that the jury were to weigh the evidence and, in view of the rules adopted by different companies, determine whether defendant had discharged its duties, but that they were not to find a rule proper or improper because some other company had adopted or rejected it. *Held*, no error. *Id.*

RECEIVER.

1. Upon an application for the voluntary dissolution of a corporation, under the provisions of the Code of Civil Procedure (§§ 2419 *et seq.*) the court acquires jurisdiction upon a petition properly presented; by its appointment of a receiver the property of the corporation comes into its possession, and it has power to preserve and protect it; for this purpose it may prohibit any interference therewith in any action thereafter instituted. *In re Christian Jensen Co.* 550

2. While a receiver so appointed may not interfere with the property until he has filed his bond, when this is done his title relates back to the date of his appointment. *Id.*

3. Even as to property of which the corporation had wrongfully obtained possession before the appointment of a receiver, after it has passed into his possession the owner may not, without first obtaining leave of the court, replevy it in an action against the receiver. *Id.*

REFORMATION OF CONTRACT.

A written agreement, while it exists must control as to all the terms expressed in it, although those terms differ from the prior oral agreement. If the difference was caused by mutual mistake, it is necessary to reform the contract so as to express the true agreement. *Linton* v. *Unexcelled Fireworks Co.* 672

RELEASE.

1. Plaintiff's complaint set forth a cause of action for malicious prosecution and alleged that plaintiff had executed a release thereof,

which release was extorted by threats and under duress. The relief asked was that the release be canceled and damages awarded for the malicious prosecution. The case came up for trial at Circuit, and upon plaintiff's opening, the court upon its own motion directed the withdrawal of a juror and the transfer of the cause to the Special Term for trial. The case was tried there, neither party objecting, and no demand for a jury trial having been made by plaintiff to determine any of the issues. At the close of the evidence the complaint was dismissed. *Held*, that it was proper to send the case for trial to the Special Term, the equitable relief sought being an indispensable condition to the existence of the legal right of action; that plaintiff, having proceeded to trial without objection, or request for the intervention of a jury, could not complain here of the tribunal to whose jurisdiction he had submitted. *Stono* v. *Weiller*. 655

2. It appeared that the release was executed after bail had been given by plaintiff on his arrest and against the advice of his counsel. *Held*, that a finding that plaintiff executed said release freely and willingly and without coercion or fear, was justified. *Id.*

RELIGIOUS CORPORATIONS.

——*When extra allowance of costs not proper on dismissal of complaint in action to try title to office in a religious corporation.*
See People ex rel. v. *Adams*. 129

REMEDIES.

1. Trespasses upon real property effected by an illegal structure thereon are continuous in their nature and give to the owner separate successive causes of action at law for damages, from time to time, as the injuries are perpetrated. *Pappenheim* v. *Met. E. R. Co.* 436

2. In each action the measure of recovery is for the damages sustained up to the time of its commencement. *Id.*

3. The owner may also resort to equity to prevent continuance of the trespass and a multiplicity of actions at law. *Id.*

4. In an equity action the court may, in case the defendant has the right to acquire title under the power of eminent domain, determine the amount of damages which the owner would sustain if the trespass were permanently continued, and may provide for payment of that amount by defendant and the execution by the owner of a conveyance of his rights, and may refuse an injunction in case defendant is willing to pay upon receipt of a conveyance. *Id.*

5. *It seems* that where the defendent in the equitable action has no legal right to acquire the property, the condition allowing him to pay permanent damages will not be inserted, but upon the right of the owner being determined, plaintiff is entitled to recover his damages up to the entry of judgment, and to an injunction. *Id.*

——*Where party claims to have been misled by entry on clerk's minutes on trial, and in consequence failed to produce proof, his proper remedy is not by appeal but by motion to have case opened and be let in to make further proofs.*
See Quinlan v. *Stratton* (Mem.). 659

REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SALARY.

——*When agreement on part of employe of a department of government of city of New York not to draw salary during periods of suspension amounts to waiver of right to the salary.*
See Emmitt v. *Mayor, etc.* 117

SALES.

Upon the trial of an action for the conversion of a quantity of lumber, which plaintiffs claimed had been sold by defendant to G. & E.

H., their assignors, defendant claimed that it was the intention and agreement of the parties that it should retain the title to the lumber until it had been used in the construction of two boats which G. & E. H. had contracted to build for it. The plaintiffs offered in evidence an order addressed to defendant's agent for the lumber; also a bill therefor sent by defendant, in which G. & E. H. were specified as debtors to defendant for the lumber, the items of which were stated, with the prices. Defendant then offered to show by its agent, who sent the bill, that it was sent merely as a memorandum of the value of the lumber, and to notify G. & E. H. for what amount they would be required to account on the settlement of the boat contract. This offer was overruled and the evidence excluded. *Held*, error. *Crosby* v. *Prest., etc., D. & H. C. Co.* 641

See JUDICIAL SALES.
VENDOR AND PURCHASER.
TAX SALES.

SEWERS.

—— *The act of* 1889, *in relation to local improvements in town of Flatbush* (*Chap.* 161, *Laws of* 1889), *does not authorize construction of sewer in a highway in town of Flatlands without consent or acquisition of title of owners of soil, and this although the highway may be considered as an urban street.*

See Van Brunt v. *Town of Flatbush.* 50

SPECIAL PROCEEDINGS.

1. Upon an appeal from an order of Special Term confirming an award of commissioners appointed to appraise lands taken by a railroad company, the General Term reversed the order of Special Term and ordered a new appraisal before the same commissioners. *Held*, that the order, being one in a special proceeding and not final, was not appealable to this court. (Code Civ. Pro. § 190, subd. 3.) *In re S. B. R. R. Co* 93

2. The provision of the Code of Civil Procedure (§ 1361), which declares that appeals from determinations in special proceedings are governed by the provisions of said Code, and the general rules of practice relating to "an appeal in an action, except as otherwise specially prescribed by law," applies to appeals to the General Term of the Supreme, or of a superior city court, not to appeals to this court. *Id.*

SPECIFIC PERFORMANCE.

1. Although it is a matter of discretion with a court of equity as to whether it will enforce a contract for the purchase and sale of lands, it is a discretion which proceeds in its exercise upon settled rules and not arbitrarily, and if notwithstanding all the legal questions raised by objections or suggested from the records, the vendor is found to have the legal title to the premises and a legal right to convey as he has agreed, performance by the vendee must be decreed. *Haberman* v. *Baker.* 253

2. *It seems* the vendor's right to enforcement of such a contract should be considered more favorably than in the case where the proceeding is to compel the purchaser at a judicial sale to carry out his bid. *Id.*

3. Where certain lands in the city of New York were conveyed, bounded on the westerly side by an old road, title to the center whereof was in the grantor, and on the north by a road leading eastwardly from the other, title to the whole of which was in the grantor, and where, in the subsequent laying out and opening of city streets, the public use of pices or gores of land, parts of the old road included in said titles, was abandoned, *held*, that the right to such use reverted to the successor in title to said grantee; that he had a full title to and right to convey the land bounded by the new streets; and so, was entitled to a judgment requiring a specific performance of a covenant for the purchase thereof. *Id.*

4. *It seems*, the rule is different where the description in a deed bounds the land by the side of the highway, or where there is a city street the title to which is in the municipality. *Id.*

STATE.

1. *It seems*, that the state in submitting itself to the jurisdiction of a tribunal, with respect to claims against it for damages sustained by reason of any accident occurring on its canals, or connected with their care and management, subjected the determination of its liability to the government of those rules which usually obtain in similar cases. *Gates* v. *State*. 221

2. A citizen who seeks to avail himself of the privilege to sue the state must be held to strictness in procedure; this right being dependent upon compliance with the terms of the statute granting it jurisdiction of his claim, can be acquired only in the way prescribed. *Id.*

3. Upon the trial of an action, brought by the attorney-general in the name of the people, under the Code of Civil Procedure (§ 1798), to enforce the forfeiture of the charter of a corporation, it is incumbent upon the state to show that a cause of forfeiture has not only been incurred by the defendant, but that it continues to exist, that its existence involves some public interest, and that the court has authorized the bringing of the action. *People* v. *U. & D. R. R. Co.* 240

4. Such an action is always within the control of the state, as the sole party interested, to prosecute or abandon at its will or pleasure, and it may, through its legislature, not only discontinue the action, but waive or abolish causes of forfeiture, declare rights of action and limit the operation of the statute by forbidding the prosecution of such an action in specified cases. *Id.*

See CANALS.

STATE COMPTROLLER.

See COMPTROLLER'S DEED.

STATUTES.

1. Where language is used in a statute which has a natural and legitimate office to perform, a construction which will create a criminal offense when none is expressed, is not justified. *People* v. *Tanner*. 416

2. That construction of a statute should be avoided which will injuriously affect existing rights, and one given which will harmonize its objects with the preservation and enjoyment of all such rights. *Suburban R. T. Co.* v. *Mayor, etc.* 510

—— *Chap.* 279, *Laws of* 1833.
—— *Chap.* 418, *Laws of* 1879.
See Tremaine v. *Mortimer*, 1.
—— *Chap.* 161, *Laws of* 1889.
See Van Brunt v. *Town of Flatbush*, 50.
—— *Chap.* 290, *Laws of* 1867.
—— *Chap.* 723, *Laws of* 1887.
See In re Southern Boulevard R. R Co., 93.
—— *Chap.* 490, *Laws of* 1883.
See Emmitt v. *Mayor, etc.*, 117.
—— *Chap.* 519, *Laws of* 1870.
—— § 24, *chap.* 140, *Laws of* 1850.
See Reining v. *N. Y., L. & W. R. Co.*, 158.
—— *Chap.* 353, *Laws of* 1886.
See People ex rel. v. *P. E. House of Mercy*, 180.
—— *Chap.* 681, *Laws of* 1881.
See Gilman v. *Tucker*, 190.
—— *Chap.* 321, *Laws of* 1870.
—— *Chap.* 244, *Laws of* 1886.
See Gates v. *State*, 221.
—— *Chap.* 183, *Laws of* 1885.
See Austin v. *Vrooman*, 230.
—— *Chap.* 430, *Laws of* 1874.
—— *Chap.* 361, *Laws of* 1881.
—— *Chap.* 236, *Laws of* 1889.
See People v. *U. & D. R. R. Co.*, 240.
—— 1 *R. S.* 739, §§ 143, 145.
See Thompson v. *Simpson*, 271.
—— 1 *R. S.* 389, § 3.
—— *Chap.* 427, *Laws of* 1855.
—— *Chap.* 448, *Laws of* 1885.
See Joslyn v. *Rockwell*, 334.
—— *Chap.* 325, *Laws of* 1888.
—— *Chap.* 461, *Laws of* 1889.
—— *Chap.* 493, *Laws of* 1889.
See Waterloo W. Mfg. Co. v. *Shanahan*, 346.
—— §§ 48, 52, *chap.* 86, *Laws of* 1850.
—— *Chap.* 429, *Laws of* 1889.
See Reid v. *Bd. Supervisors*, 364.

—— *Chap* 462, *Laws of* 1888.
See In re Split Rock C. R. Co., 408.
—— § 23, *chap.* 534, *Laws of* 1879.
—— *Chap.* 127, *Laws of* 1884.
See People v. *Tanner*, 416.
—— *Chap.* 606, *Laws of* 1875.
—— *Chap.* 522, *Laws of* 1884.
See Suburban R. T. Co. v. *Mayor, etc.*, 510.
—— 1 *R. S.* 389, § 5.
—— 1 *R. S.* 419, § 3.
See People ex rel. v. *Coleman*, 524.
—— *Chap.* 493, *Laws of* 1887.
See People v. *Trezza*, 529.
—— *Chap.* 589, *Laws of* 1881.
See Compton v. *The Chelsea*, 537.
—— *Chap.* 291, *Laws of* 1870.
—— *Chap.* 68, *Laws of* 1887.
—— *Chap.* 172, *Laws of* 1888.
See People ex rel. v. *Straight*, 545.
—— *Chap.* 522, *Laws of* 1885.
See McKuskie v. *Hendrickson*, 555.
—— *Chap.* 606, *Laws of* 1875.
See In re Metropolitan E. R. R. Co., 600.

See LIMITATION OF ACTIONS.
STATUTE OF FRAUDS.

STATUTE OF FRAUDS.

1. The Statute of Frauds is not an obstacle to the enforcement by a court of equity of the doctrine that the owner of land may by his acts preclude himself from asserting his legal title against one who, in reliance thereon, has placed himself in a position where to allow the legal owner of the land to assert his right would operate as a fraud upon the other party; that court will not permit a statute made for the prevention to be used as an instrument, of fraud. *Thompson* v. *Simpson*. 270

2. The parties entered into a verbal contract by which plaintiff agreed to occupy a portion of defendant's farm for a period of five years, each to do certain work and furnish certain things specified, the receipts of sales of the products of the land to be equally divided. Plaintiff took possession of the premises and occupied for over two years, when he was dispossessed. In an action to recover damages for breach of the agreement, *held*, that it was void, as it was not to be performed within a year; that the occupancy under it did not create a tenancy from year to year, and the relation of landlord and tenant in any form was not created either by the agreement or in consequence of any occupancy under it; and so, that plaintiff was not entitled to recover. *Unglish* v. *Marvin*. 380

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STAY OF PROCEEDINGS.

1. An appeal under the provision of the Code of Criminal Procedure (§ 528, as amended by chap. 493, Laws of 1887), to this court from a conviction in a capital case, stays the judgment of death, but not that part providing for the custody of the defendant between his removal to the state prison and his execution. *People* v. *Trezza*. 529

2. In proceedings by habeas corpus, it appeared that the relator was convicted of the crime of murder and sentenced to death; that he appealed to this court where the judgment was affirmed; that after the appeal he was taken to state prison and there detained in close confinement. One ground upon which the prisoner's discharge was asked was that he had been once punished by imprisonment. *Held*, untenable; also that if the appeal operated to stay the continuance of the close confinement as well as the execution of the death penalty then his subsequent imprisonment was unlawful, and the convict could not elect to submit to it and then treat it as a satisfaction of the sentence. *Id.*

STIPULATION.

1. The Court of Appeals, on appeal to it, can consider only errors alleged to have been committed by the court below, and the case must be heard upon the same record which was used before the General Term. A reversal of a judgment, therefore, cannot be based upon matter subsequently brought into

the case by stipulation, and such a stipulation will be disregarded. *People* v. *Dewey*. 606

2. Where a town supervisor, after service of notice of appeal, withdrew the same upon receipt of a stipulation extending time to appeal and subsequently entered into an agreement for a compromise and settlement of the action and, thereupon, an order was entered upon stipulation dismissing the appeal, *held*, that while the court below might give relief against the stipulations and order, defendant was not entitled thereto, as matter of law, but it rested in the discretion of the court; and that the exercise of this discretion was not reviewable here. *Chase* v. *Defendorf*. 652

STOCKHOLDERS.

—— *As to rights of stockholders of a corporation organized for the purpose of erecting an apartment-house under the amendment of the Manufacturing Act of* 1881 (*Chap.* 589, *Laws of* 1881). *See Compton* v. *The Chelsea*. 537

STREETS.

See HIGHWAYS.

SUPERVISORS.

1. The supervisor of a town has power, notwithstanding the direction of a town meeting, to refuse or neglect to appeal from a judgment rendered against him as such officer, and an appeal if brought is still under his and his attorney's control, and they may withdraw the same. *Chase* v. *Defendorf*. 652.

2. Where a supervisor, after service of notice of appeal, withdrew the same upon receipt of a stipulation extending time to appeal and subsequently entered into an agreement for a compromise and settlement of the action and, thereupon, an order was entered upon stipulation dismissing the appeal, *held*, that while the court below might give relief against the stipulations and order, defendant was not entitled thereto, as matter of law, but it rested in the discretion of the court; and that the exercise of this discretion was not reviewable here. *Id.*

SURROGATE'S COURT.

1. Under the provision of the Code of Civil Procedure (§ 2699), declaring that "before ancillary letters of administration are issued, the person to whom they are awarded must qualify in the manner prescribed for the qualification of an administrator upon the estate of an intestate, except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of this state," the power of the surrogate is not limited to requiring a bond not exceeding twice the amount appearing to be due to residents. *In re Prout*. 70

2. Said provision was intended to give the surrogate a discretion to modify the general rule (§ 2667), which requires a bond in a penalty not less than twice the value of the personal property and to accept one less in amount if, by reason of adequate security having been already given, additional security for the protection of the general interests is not in his judgment required, or where the next of kin have consented to waive security, and in the case of domestic creditors, where their protection was the only interest involved, to prescribe a limit beyond which security should not be exacted. *Id.*

3. Where, therefore, adequate security to protect the general interests had not been given, and other interests aside from those of domestic creditors were involved, *held*, that the surrogate had power to require as a condition of granting ancillary letters, a bond in the penalty of double the value of the personalty in this state. *Id.*

4. A surrogate, in a proceeding before him having for its object the settlement of an executor's ac-

counts and the obtaining of a decree directing the distribution of the fund in his hands, when all the parties in interest are present, has authority to construe the provisions of the will and determine their meaning and validity, whenever necessary in order to make his decree as to distribution. *Garlock* v. *Vandevort*. 374

5. Such jurisdiction is incidental to the office and flows from the authority conferred upon the surrogate by the statute (Code Civ. Pro. § 2472), and is equal to and concurrent with the jurisdiction of the Supreme Court. *Id.*

6. The will of G. gave to his "grandchildren living in Michigan," at his decease, all his property in that state. A clause in a codicil stated that the testator was "in no wise pecuniarily indebted to any of his children," and declared null and void any testamentary gift to any of them who should present a claim against the estate save for the bequest or devise given in the will. In an action by one of the executors for the construction of the will, the complaint questioned the right of one of the grandchildren to be a legatee as to that portion of the estate in Michigan, and also the right of a child of the testator who had presented and had been allowed and paid a claim against the estate to a gift in the will to him. It appeared that at the time the action was brought, there was pending in the Surrogate's Court a proceeding instituted by plaintiff's co-executor for a judicial settlement of his accounts, in which were brought all the parties to the action, and that by objections filed therein the question as to the effect of the clause in the codicil was raised. The trial court dismissed the complaint. *Held*, no error; that the question as to the residence of the grandchild was one of fact proper to be disposed of by the surrogate and constituted no ground for invoking the jurisdiction of the court; that the question as to the construction of the codicil was within the jurisdiction of the Surrogate's Court, and that tribunal having first obtained jurisdiction, was entitled to retain and continue to exercise it. *Id.*

TAXATION.

See ASSESSMENT AND TAXATION.

TAX SALES.

1. Under the provisions of the act providing "for the assessment and collection of taxes in the city of Albany" (§ 52, chap. 86, Laws of 1850), which, in case a purchaser at a tax sale shall be unable to recover possession of the real estate because of error or irregularity in the proceedings for the levying or collection, requires the board of supervisors of the county to reimburse the purchase-money, and upon the refusal or neglect to do so, authorizes the recovery of the money in an action against the board, when, in consequence of some defect in the proceeding, a sale is invalid, and because thereof the purchaser is unable to recover possession, he is at once entitled to reimbursement and his cause of action is barred, if suit is not brought in six years from the time when the right to make a demand for reimbursement was complete. (Code Civ. Pro. § 410.) *Reid* v. *Bd. Supvrs.* 364

2. In an action under said provision to recover back the purchase-money paid on various tax sales, all of which were made in and prior to 1883, and more than seven years before the commencement of the action, it was not alleged in the complaint or shown upon the trial that any legal proceeding had been instituted by the purchaser or his successor in interest to recover possession of the land, or that he made any effort to obtain possession, but it was admitted that by a decision of this court (*Remsen* v. *Wheeler*, 105 N. Y. 573), rendered four years after the sale in an action between other parties, sales under similar proceedings in another locality were adjudged illegal and void. The court below decided that neither the purchaser nor plaintiff, his successor in interest, was entitled to bring an ac-

tion for reimbursement until such decision, and so that the action was not barred by the statute. *Held*, error; that the decision had no effect upon and in no way changed the rights, duties or obligations of the parties here, but was simply an authority as to the law. *Id.*

B. *It seems* said provision requires that before a recovery can be had in such an action plaintiff must show an effort on the part of the purchaser to obtain possession under the tax sale, and that he was unable to do so because of its invalidity; it is not sufficient to show merely that the sale was illegal. *Id.*

TENANTS IN COMMON AND JOINT TENANTS.

1. Where land is conveyed to husband and wife without any express restriction as to the character of their holding, they take as tenants by the entirety. *Stelz* v. *Shreck.* 263

2. As such tenancy is founded upon the marital relation and upon the legal theory that the husband and wife are one, it depends for its continuance upon the continuance of the relation, and when the unity is broken by a divorce the tenancy is severed; each takes a proportionate share of the property as a tenant in common. *Id.*

3. There is no implied condition annexed to an estate by the entirety that the grantees shall remain faithful to the marriage vow, or that either shall not by misconduct cause a severance of the marital relations, and a decree of divorce granted because of adultery does not vest the whole title in the innocent party. *Id.*

TITLE.

A purchaser of real estate is not entitled to demand a title absolutely free from all suspicion or possible defect. He may claim simply a marketable title, that is one which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to and ought to accept. *Todd* v. *U. D. Savings Institution.* 636

TOWNS.

The supervisor of a town has power, notwithstanding the direction of a town meeting, to refuse or neglect to appeal from a judgment rendered against him as such officer, and an appeal if brought is still under his and his attorney's control, and they may withdraw the same. *Chase* v. *Defendorf.* 652

See FLATBUSH (TOWN OF).

TRAMWAY CORPORATIONS.

—— *As to right of tramway corporations to take property under power of eminent domain.*
See In re S. R. C. R. Co. 408

TRESPASS.

1. Trespasses upon real property effected by an unlawful structure or nuisance are continuous in their nature and give separate successive causes of action from time to time as the injuries are perpetrated, barred only by the running of the statute against the successive tresspasses. *Galway* v. *Met. E. R. Co.* 132

2. No lapse of time or inaction merely on the part of an owner after the erection and during the maintenance of the unlawful structure, unless it has continued for such a period of time as will effect a change of title in the property or authorize the presumption of a grant, is sufficient to defeat the right of the owner to his action at law or equity. *Id.*

3. So, also, the right of an abutting owner to maintain an action at law or equity because of an invasion of his rights in a public street by the erection thereon of a structure

which impairs his easement therein, continues so long as he continues to be the owner of the property, without regard to the lapse of time provided the remedy is claimed within the statutory period of limitation applicable to the legal right and before adverse possession has barred his title. *Id.*

4. It is immaterial, either in equity or law, whether the injuries done were originally intended by the wrong-doer to be perpetual and permanent, or were of a temporary nature only and occasional in their operation. *Id.*

5. While, therefore, the lapse of six years after the erection of such a structure bars not only the legal, but is a practical defense to an equitable action, based upon the original tresspass, if the structure is continued new causes of action arise, unbarred by any rule of law or equity and cognizable not only at law but in equity until the statute has run as against each. *Id.*

6. Accordingly *held*, that the right to bring an action to restrain an elevated railroad company which had constructed its road in a street in front of plaintiff's premises and thereby unlawfully interfered with plaintiff's easements in the street, was not barred by the lapse of ten years from the time the road was constructed. (Code Civ. Pro. § 388.) *Id.*

7. Under the provisions of the Code of Civil Procedure (§ 3228), specifying the cases in which a plaintiff is entitled to costs, all actions for tresspasses on lands, so far as costs are concerned, stand on the same footing, and in an action for the recovery of treble damages, as well as in other actions of trespass where the title to the premises is not put in issue, if plaintiff recovers less than fifty dollars damages, not he, but the defendant is entitled to costs. (§ 3329.) *Lynk* v. *Weaver*. 171

8. The clause in said provision giving to plaintiff costs on recovery of judgment, irrespective of amount, "where a claim of real property arises on the pleadings," refers to a case where plaintiff's title is disputed by the answer. *Id.*

9. No claim of title arises in an action of trespass on lands upon a mere assertion of title in the complaint, which is not denied by the answer, and in such case plaintiff, upon a recovery of less than fifty dollars, is not entitled to costs. *Id.*

10. Such an action is one to recover damages for "an injury to property" (Code Civ. Pro. § 2862), and so, unless the title is put in issue, is one of which a justice of the peace can take cognizance. *Id.*

11. Trespasses upon real property effected by an illegal structure thereon are continuous in their nature and give to the owner separate successive causes of action at law for damages from time to time as the injuries are perpetrated. *Pappenheim* v. *Met. E. R. Co.* 436

12. In each action the measure of recovery is for the damages sustained up to the time of its commencement. *Id.*

13. The owner may also resort to equity to prevent continuance of the trespass and a multiplicity of actions at law. *Id.*

14. In an equity action the court may, in case the defendant has the right to acquire title under the power of eminent domain, determine the amount of damages which the owner would sustain if the trespass were permanently continued, and may provide for payment of that amount by defendant and the execution by the owner of a conveyance of his rights, and may refuse an injunction in case defendant is willing to pay upon receipt of a conveyance. *Id.*

15. *It seems* that where the defendant in the equitable action has no legal right to acquire the property, the condition allowing him to pay permanent damages will not be inserted, but upon the right of the owner being determined, plaintiff is entitled to recover his damages up to the entry of judgment and to an injunction. *Id.*

16. As to whether where the trespasser is a railroad corporation actually running its cars upon or through plaintiff's property, it will be justified in refusing to pay the amount of permanent damages upon delivery of a conveyance, and in submitting to an injunction, *quære*. *Id.*

17. Where the owner of property affected by such an illegal structure sells and conveys the absolute fee, the vendee takes it with all the easements appurtenant to the premises, and all the rights of a general owner, and these may not be interfered with without compensation; and so, he may maintain an action to recover damages accruing after his purchase, or to restrain the continuance of the trespass. *Id.*

TRIAL.

1. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, the testimony was to this effect: Plaintiff was riding in one of defendant's street cars; a wagon loaded with lumber was moving in the opposite direction, using the rails of another track. The driver of the wagon, after it had passed the driver of the street car and when it was abreast of the car, suddenly turned off the track; the lumber which projected beyond the wagon was, by the movement, thrust through a window of the car, and struck the plaintiff, inflicting the injury complained of. The car driver happening to look up in his mirror saw the wagon driver in the act of turning out, and he at once set the brake and stopped the car. It was claimed that the car was traveling at an unusual rate of speed. *Held*, that the evidence failed to show any negligence on the part of defendant, and the submission of the question to the jury was error; that assuming the rate of speed of the car was unusual, it had nothing to do with the accident. *Alexander* v. *R. C. & B. R. R. Co.* 13

2. In an action to recover damages for injuries to plaintiffs' goods, caused by steam which escaped from certain apparatus, which defendant, a corporation engaged in furnishing steam for the purposes of heat and motive power, had put into the premises occupied by plaintiffs, under a contract with them, it appeared that after the apparatus had been tested in the usual manner and found to be apparently safe and adequate, the premises were closed from Saturday night until Tuesday morning; that shortly after they were opened the bonnet on the service valve in one of the pipes in the basement was blown off and the steam escaped, doing the injuries complained of. It was proved that no similar accident had happened in defendant's business; that defendant used the best material, purchased of manufacturers of high repute, and employed competent and skilled workmen, and there was no evidence of any visible defect or that the work was not well done. *Held*, that the refusal to nonsuit was error; that the burden was upon the plaintiffs to show that defendant failed to use the degree of care which ordinary prudence and foresight would, under the circumstances, suggest; that the mere fact that the bonnet blew out did not furnish sufficient evidence of negligence. *Reiss* v. *N. Y. Steam Co.* 103

3. In an action to recover damages for injuries received by plaintiff while using a toboggan upon a slide on premises in the possession and management of defendants, the complaint alleged that defendants were a joint stock company doing business in New York city under a name given, and that the injuries arose from negligence of their employes. Their answer denied the allegations of the complaint. Upon the trial, plaintiff gave no evidence as to defendants being a joint stock company, but endeavored to prove a joint or partnership liability based upon allegations that the premises were leased to them for the purpose of putting up the toboggan slides. Defendants claimed that they were simply individual members of and stockholders in an incorporated company, which hired the grounds and operated the slides. They

offered in evidence a certificate of incorporation of such company under the laws of West Virginia and also the Code of said state. These were objected to on the ground that the existence or incorporation of such company should have been pleaded. The objections were overruled. *Held*, no error; that the defense was not one necessary to be pleaded, but was admissible under the general denial in the answer. *Demarest* v. *Flack*. 205

4. The effect of a request by both parties upon trial of an action for a direction of a verdict in his favor is to clothe the court with the functions of the jury; if the party, whose request is denied, does not thereupon request to go to the jury on the facts, a verdict directed for the other party stands, as would the finding of a jury for the same party in the absence of any direction, and the review, upon appeal to this court, is governed by the same rules as apply in cases of verdicts rendered without direction; all controverted and inferable facts will be deemed conclusively established in favor of the party for whom the verdict was directed. *Thompson* v. *Simpson*. 270

5. The mere intimation of an opinion by a judge upon the evidence or upon the merits of the case, or his comments upon the evidence, although unfavorable to one of the parties, while it may be ground for setting aside the verdict on motion, furnishes no ground for a reversal in this court, where the case was submitted to the jury upon a charge which laid down no improper rule of law. *Hurlburt* v. *Hurlburt*. 420

6. Where, upon the trial of an action by an abutting owner to recover damages caused by the erection and operation of an elevated railroad in a street, a question calling for the opinion of an expert witness called by plaintiff as to what would have been the value of the premises if the road had not been constructed, a general objection of incompetency was interposed, which was overruled, *held*, no error; that the objection did not raise the point that the opinion of the witness was inadmissible; that it was aimed not at the mode of proof, but rather at the competency of the fact sought to be proved. *Kernochan* v. *N. Y. E. R. R. Co.* 559

7. Where a question put to a medical expert calls for his opinion, based upon the knowledge of the witness himself and what he may have derived from outside sources and not predicated solely upon the facts in evidence, or where, among other things, it calls for the witness's opinion as to possible consequences, such as are speculative and not reasonably certain, a specific objection is necessary to present the point on appeal. *Wallace* v. *Vacuum Oil Co.* 579

8. A general objection to a question will not suffice, unless the question is altogether improper, or the evidence called for is in its nature quite inadmissible. *Id.*

9. In an action to recover damages for injuries received by plaintiff while getting on one of defendant's street cars, it appeared that plaintiff was a man twenty-six years old, able-bodied and unincumbered; he waited for one of defendant's open cars upon a crosswalk and motioned for it to stop; when it had nearly stopped he put his foot on the step on the side of and near the middle of the car and took hold of the stanchion, and after the car had moved six or seven feet, he was struck by the wheel of a truck which was standing in the street. *Held*, that a refusal to nonsuit was error; that it was plaintiff's duty to see, before getting on the car, that there was no obstacle outside the car which would make it dangerous for him to attempt to get on board, and that if the injury was attributable to any negligence, it was, in part, at least, that of plaintiff. *Moylan* v. *Second Ave. R. R. Co.* 583

10. Plaintiff's complaint set forth a cause of action for malicious prosecution and alleged that plaintiff had executed a release thereof, which release was extorted by threats and under duress. The relief asked was that the release be

canceled and damages awarded for the malicious prosecution. The case came up for trial at Circuit, and upon plaintiff's opening, the court upon its own motion, directed the withdrawal of a juror and the transfer of the cause to the Special Term for trial. The case was tried there, neither party objecting, and no demand for a jury trial having been made by plaintiff to determine any of the issues. At the close of the evidence the complaint was dismissed. *Held*, that it was proper to send the case for trial to the Special Term, the equitable relief sought being an indispensable condition to the existence of the legal right of action; that plaintiff, having proceeded to trial without objection, or request for the intervention of a jury, could not complain here of the tribunal to whose jurisdiction he had submitted. *Stono* v. *Weiller*. 655

11. Upon the trial of an action to recover damages for alleged negligence causing the death of plaintiff's testator, a repairman in defendant's employ, who was killed while at work under a car, the negligence charged was the omission to promulgate proper rules for the protection of car repairers. The rules of other companies upon this subject were given in evidence, and the court charged in substance that the jury were to weigh the evidence and, in view of the rules adopted by different companies, determine whether defendant had discharged its duties, but that they were not to find a rule proper or improper because some other company had adopted or rejected it. *Held*, no error. *Abel* v. *Prest., etc., D. & H. C. Co.* 662

12. A creditor, seeking to recover of his debtor a balance alleged to be due, where the amount of the indebtedness to him is undisputed, should not be turned out of court because he does not show how much should be deducted therefrom by way of credit. *Cheever* v. *Brown*. 670

13. In an action to recover the purchase-price of certain goods, the answer was a general denial. The evidence upon the trial showed conclusively the sale, delivery and acceptance of the goods. Defendants sought to show that after delivery defendants complained of the quality of the goods, and it was thereupon agreed that they should be considered as having received them as consignees to sell for and on account of plaintiffs; this was excluded. *Held*, no error: that it was an affirmative defense which might not be proved under a general denial. *Wallace* v. *Blake*. 676

—— *Where party claims to have been misled by entry on clerk's minutes on trial, and in consequence failed to produce proof, his proper remedy is not by appeal but by motion to have case opened and be let in to make further proofs.*

See Quinlan v. *Stratton* (Mem.). 659

See CRIMINAL TRIAL.

TRUSTS AND TRUSTEES.

Under a liquidation agreement between a corporation and its creditors, plaintiffs were appointed trustees. In an action upon certain promissory notes given for property purchased by defendant of the trustees after they had assumed the trust, the answer alleged that defendant, as creditor, was induced to become a party to the liquidation agreement by false representations, and asked to have the same set aside and canceled as to him. *Held*, that a demurrer to the answer was properly sustained; that the proper parties were not represented in the litigation to entitle defendant to judgment upon the issue sought to be made by his answer; and that it set up no defense, as fraud inducing the execution of the contract was no answer to defendant's obligation to pay for property purchased of the trustees. *Otis* v. *Shants*. 45

See EXECUTOR AND ADMINISTRATOR.

UNDERTAKING.

1. An undertaking on appeal may be in any form which expresses the intent of the parties with sufficient

clearness to enable the court to understand its meaning. *McElroy* v. *Mumford*. 303

2. It is not the office of the undertaking to show the nature and scope of the appeal, and the only object of describing the judgment therein is to enable it to be identified as the subject of the instrument, and when this is accomplished its office is performed. *Id.*

3. Under the provision of the Code of Civil Procedure (§ 1332), that in case of an appeal to the Court of Appeals from a judgment or order of affirmance, "the undertaking must be the same as if the judgment or order from which the appeal is taken was to the same effect as the judgment or order so affirmed," an order of affirmance must be treated as though it had directed the payment of the same sum as that provided for by the original judgment, and an undertaking given on appeal from a judgment of affirmance has the same effect as if the judgment had expressly directed the payment of the sum included in the original judgment. *Id.*

4. An undertaking given upon an appeal to this court from a judgment of the General Term, after describing the judgment as one recovered by the respondent against the appellant on December 12, 1887, for "$122.97, being costs of affirmance," and after stating the court and county in which it was entered, was to the effect that in case of affirmance the appellant would pay the sum directed to be paid by the judgment appealed from, or the part thereof affirmed. The notice of appeal served therewith described the appeal as from an order affirming a judgment entered June 30, 1887, for $3,659.08 and from a judgment entered December 12, 1887, "for $122.97, costs upon said affirmance." The order for judgment entered at General Term recited the affirmance, on December 12, 1887, of the judgment entered June 30, 1887, with costs and disbursements; that the costs had been taxed at $122.97. In an action upon the undertaking, the sureties claimed that, as the undertaking referred to the judgment of General Term as one for costs alone, it should not be held to cover the original judgment which was affirmed, and so, that they were only liable for so much of said judgment as awarded costs. *Held*, untenable; that the evident intent was to appeal from and to secure a stay on the entire judgment of the General Term (Code Civ. Pro. 1326, 1327, 1334), and this the language of the undertaking sufficiently indicated, and so, it must be held to be applicable to the entire judgment, not simply to the costs, a mere incident thereof, and as the effect of such judgment was to authorize the plaintiffs to proceed and collect the original judgment, the sureties were liable for its payment. *Id.*

5. In an action to recover the possession of personal property, defendant gave an undertaking for the return of the property, which contained a recital admitting that plaintiffs had taken the property described in his affidavit and requisition from defendant's possession. Upon the trial, defendant offered to prove that he did not have in his possession, when demand was made upon him, more than one-quarter of the property mentioned in plaintiffs' affidavit, which offer was rejected, upon the ground that the admission was conclusive. Thereafter defendant, with the consent of his sureties, moved at Special Term for leave to substitute a new undertaking without the admission, in place of the original. The motion was denied upon the ground that as the court had held the admission conclusive, the court had no power to grant it. *Held*, error; that it was conclusive only until set aside, and as to whether or not this should be permitted, rested in the discretion of the Supreme Court. *Dale* v. *Gilbert*. 625

See BOND.

UNLAWFUL ASSEMBLIES.

1. *It seems* that to uphold an indictment for an unlawful assembly under the Penal Code (§ 451, subd.

3), it must be proved that three or more persons being assembled, united in attempting or threatening an act "tending towards a breach of the peace or an injury to person or property, or any unlawful act." A threat made by one or two persons only although in an assembly of many persons, would not be indictable. *People* v. *Most*. 108

2. It need not affirmatively appear, however, that other persons present when the threat was made, uttered or repeated the same words; participation in the threat may be shown by the adoption by others of the language used, exhibited by their conduct. *Id.*

3. Threats of personal violence made in an assembly in this state against residents of another state are within the statute. The legislature may properly pass laws to punish plotters in this state against the public peace of a sister state. *Id.*

4. So, also, threats relating to acts not presently to be done, but to be performed at some future time, are within the statute. *Id.*

5. M. was indicted under the Penal Code for participating in an unlawful assembly. The meeting in question took place the day before the hanging of the Chicago anarchists. It was attended by from eighty to one hundred people mostly anarchists, in sympathy with M., who openly avowed himself to be one. When he entered the persons present hailed him as their leader, and when he denounced the authorities as the murderers of their "friends and comrades" and threatened revenge they applauded and cheered him. *Held*, that there was sufficient evidence of the requisite concurrence of the statutory number to go to the jury. *Id.*

6. M., in his speech, denounced the government, the officers of the law and the judges concerned in the trial, advised his hearers to arm and be prepared for the revolution "not far distant," and declared that they would avenge the blood of their comrades, and declared that the governor of Illinois would not be "spared" in the general destruction. He referred to the "police bloodhounds," and exclaimed, "God help them if they are found in our socials." The audience exhibited by their cheers and appearance warm approval of these sentiments, and when the speaker said the day of revolution was "not far distant" one of them said excitedly: "Why not to-night, for we are ready and prepared." *Held*, that the evidence was sufficient to warrant a finding by the jury that these utterances were used and understood as threats; and that such a finding was conclusive upon this court. *Id.*

USURY.

In an action upon a promissory note dated at Washington, D. C., made payable at a bank in the state of New York, which bore interest at a rate legal in the place of its date, but illegal in this state, it appeared that the note was given to take up another note dated at Washington and payable there, which bore the same rate of interest and was similarly indorsed. The arrangement for renewal was made in Washington where the note in suit was drawn; it was handed to the maker to execute, he took it to his home in New York where he signed it and the defendant N. indorsed it. The note was then mailed to plaintiff at Washington. The indorser set up usury as a defense. *Held*, untenable; that as the contract of the parties, evidenced by the note was made in, it was governed by the laws of the District of Columbia; that the affixing of their signatures by the maker and indorser were simply details in the performance and execution of the contract which was consummated when the note was received by plaintiff; that the naming of a New York bank as the place of payment did not characterize it as a New York contract; and that while the engagement of the indorser was, in a sense, independent of that of the maker, this did not affect the local character of the contract. *Staples* v. *Nott*. 403

VENDOR AND PURCHASER.

1. Although it is a matter of discretion with a court of equity as to whether it will enforce a contract for the purchase and sale of lands, it is a discretion which proceeds in its exercise upon settled rules and not arbitrarily, and if, notwithstanding all the legal questions raised by objections or suggested from the records, the vendor is found to have the legal title to the premises and a legal right to convey as he has agreed, performance by the vendee must be decreed. *Haberman* v. *Baker*. 253

2. *It seems* the vendor's right to enforcement of such a contract should be considered more favorably than in the case where the proceeding is to compel the purchaser at a judicial sale to carry out his bid. *Id.*

3. Where the owner of property abutting upon a street upon which an elevated railroad has been built without his consent, sells and conveys the absolute fee, the vendee takes it with all the easements appurtenant to the premises, and all the rights of a general owner, and these may not be interfered with without compensation; and so. he may maintain an action to recover damages accruing after his purchase, or to restrain the continuance of the trespass. *Pappenheim* v. *Met. E. R. Co.* 436

4. The right of a vendee to restrain future trespasses cannot be defeated because of the fact that the vendor sold, without having brought any action in equity before his conveyance, and although he sold at a loss, because of the acts of the wrong-doer. The vendor's right to bring such an action, or to receive the amount of the depreciation, ceases to exist upon the transfer of the property; he retains his right to recover the temporary damages sustained while he was owner, but the right to restrain the continuance of the trespass, and with it the right to permanent damages, passes to the vendee. *Id.*

5. A purchaser of real estate is not entitled to demand a title absolutely free from all suspicion or possible defect. He may claim simply a marketable title, that is, one which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to and ought to accept. *Todd* v. *U. D. Savings Institution*. 636

WAIVER.

——*Objections to sufficiency of a counter-claim not waived by omission to demur or to raise objection by answer.*

See Lipman v. *J. A. Iron Works*. 58

——*When agreement on part of employe of a department of city of New York not to draw salary during periods of suspension amounts to waiver of right to the salary.*

See Emmitt v. *Mayor, etc.* 117

WARRANTY.

A general warranty in a deed, not limited by other parts thereof, however technically it operates, is only consistent with an intention of the grantor to convey the whole estate. *Thompson* v. *Simpson*. 270

WELLSBURG (VILLAGE OF).

1. By the charter of the village of Wellsburg (Chap. 291, Laws of 1870, as amended by chap. 68, Laws of 1887, and chap. 172, Laws of 1888), every person elected or appointed to office is required to take and file with the clerk of the village an oath of office. By an ordinance of the board of trustees authority was conferred upon said clerk to administer such oath. A majority of the inspectors of election signed a statement as to the results of an annual election for village officers, which was filed with the clerk; this showed that there were one hundred and thirty-six ballots cast for president, of which sixty-six were

cast for the relator, "Morris A. Young," one for "Morris Young," one for "M. A. Young," one was defective and one blank. Defendant, the village clerk, when applied to for that purpose, refused to administer the oath of office to the relator, claiming that he was not legally elected. *Held*, that a mandamus was properly granted requiring defendant to perform this duty; that he was not called upon to decide as to the legality of the applicant's election; but, in his ministerial capacity, was obliged to administer the oath, if *prima facie* it appeared, as it did in this case that the individual desiring to be sworn had the greatest number of votes, at least if he was not known to be ineligible; also, that a certificate from the inspectors as to the relator's election was not requisite. *People ex rel.* v. *Straight.* 545

2. As to whether the clerk might refuse to administer and file such oath, if the applicant was known to be ineligible, *quære*. . *Id.*

WILLS.

——*When surrogate has jurisdiction to determine question as to construction of will.*
See Garlock v. *Vandevort.* 374

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